
United States
Circuit Court of Appeals
For the Ninth Circuit.

POSTAL TELEGRAPH - CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

FILED

JUL 1 - 1913

No. 2268

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Circuit Court of Appeals
For the Ninth Circuit.

POSTAL TELEGRAPH - CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

Names and Addresses of Counsel.

E. C. HUGHES, Esq., Attorney for Plaintiff in
Error,

661 Colman Block, Seattle, Washington.

MAURICE McMICKEN, Esq., Attorney for Plain-
tiff in Error,

661 Colman Block, Seattle, Washington.

WM. F. DOVELL, Esq., Attorney for Plaintiff in
Error,

661 Colman Block, Seattle, Washington.

H. J. RAMSEY, Esq., Attorney for Plaintiff in
Error,

661 Colman Block, Seattle, Washington.

C. H. WINDERS, Esq., Attorney for Defendant in
Error,

712-14 Lowman Building, Seattle, Wash-
ington.

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Petition.

Comes now the petitioner, Postal Telegraph-Cable Company of Washington, and avers:

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, having its principal place of business at the city of Seattle, in the county of King, in said State, and is a citizen and resident thereof, and that said petitioner has paid the annual license fee last due to the said State of Washington.

II.

That the defendant, the Northern Pacific Railway Company, is a corporation duly organized and existing under the laws of the State of Wisconsin, and is a citizen and resident of said State, and that it has duly complied with the laws of the State of Washington in respect to foreign corporations to

entitle it to transact its business as a railway company within said State of Washington. [1*]

III.

That the said defendant, Northern Pacific Railway Company, owns and operates a railway from the city of Seattle, in the county of King, extending northerly through the counties of King, Snohomish, Skagit and Whatcom, to the boundary line between the State of Washington and the Province of British Columbia, in the Dominion of Canada, which boundary line is at the northerly end of its depot building, in the town of Sumas, in said county of Whatcom, and which said railway, proceeding northerly from the city of Seattle, passes through the town of Bothell, in the county of King, through the towns of Snohomish and Getchell, in the county of Snohomish, through the town of Sedro Woolley, in the county of Skagit, and thence through the county of Whatcom to the northerly limits of the town of Sumas, at the international boundary line aforesaid. And said railway company is likewise the owner of a right of way extending about fifty (50) feet on each side of the center line of its said railroad, from its initial point in the city of Seattle to its terminus at the said international boundary line at Sumas.

IV.

That the petitioner Postal Telegraph-Cable Company of Washington is engaged in the telegraph business, with connecting telegraph lines throughout the United States of America and the Dominion of Canada, and with cable connections throughout the world, and now owns and operates, among other tele-

*Page-number appearing at foot of page of original certified Record.

graph lines, a line of telegraph poles and wires along, upon, over and across the said right of way of the defendant, the Northern Pacific Railway Company, beginning at the intersection of Evanston Street with said right of way, near Fremont station, in the city of Seattle, and continuing thence [2] northerly along and upon said right of way throughout the entire length thereof to the said international boundary line at the north end of the depot building, in the town of Sumas aforesaid.

V.

That said telegraph line was constructed and has at all times since its construction been maintained under and by virtue of a written contract, entered into by and between the predecessors in interest of this petitioner and of the defendant Northern Pacific Railway Company, on the 17th of February, 1888; that the said telegraph line was so constructed on said right of way between the town of Bothell in the county of King to the said international boundary line at the town of Sumas in the county of Whatcom, in or prior to the year 1891, and between the town of Bothell and the station of Fremont in the city of Seattle, in the year 1896, and said telegraph line has ever since been and now is maintained and operated on said right of way, under and in pursuance of the right and privilege conferred by the aforesaid contract and with the knowledge, consent and acquiescence of the defendant Northern Pacific Railway Company and its predecessors in interest; that said contract will expire on the 17th of February, 1913.

VI.

That this petitioner, desiring and preferring to secure by contract the perpetual right and privilege of constructing, maintaining and operating its said telegraph line along, upon, over and across said right of way of said defendant Northern Pacific Railway Company, has heretofore made earnest and *bona fide* efforts to agree with said railway company for the said right [3] and privilege, and to agree upon the compensation to be paid by it to said railway company therefor; that said railway company has refused to give its consent to petitioner for said right and privilege and has failed and refused to agree upon the compensation to be paid by it therefor; that under and by virtue of authority of an act of the Congress of the United States of America, sections 5263 to 5268, inclusive, of the Revised Statutes of the United States, and subsequent amendments thereof by said Congress, the provisions of which have been accepted by this petitioner, as well as by the authority of the statutes of the State of Washington providing for condemnation of private property and for the condemnation by a telegraph company of a portion of the right of way of a railroad company for the purpose of constructing, maintaining and operating its telegraph line along and upon said right of way, this petitioner proposes and is proceeding to condemn and acquire an easement or privilege along, upon and over the said right of way of said Northern Pacific Railway Company, for the construction or reconstruction and for the maintenance and operation of its said telegraph line, from the inter-

section of Evanston Street, near Fremont Station, in the city of Seattle, through the said counties of King, Snohomish, Skagit and Whatcom, to the international boundary line at the north end of the depot building of said railway company in the said town of Sumas; its poles to be erected as near the outer edge of said right of way as circumstances will permit, and in such position as not to interfere with the operation or safety of trains or with the use of the right of way by said railway company or its lessees, for its or their own purposes; and this petitioner proposes to herein condemn so much of the said right of way, between the points and through the counties aforesaid, as may be necessary for its uses [4] for the purpose of constructing or reconstructing, maintaining and operating its telegraph line along, upon, over and across said right of way; that said line is now and will at all times hereafter be constructed and reconstructed of the best material and by the most approved methods of construction, and will consist of a single line of poles not less than twenty (20) nor more than thirty (30) feet in length, including length underground, except at highways or where obstructions exist, where the poles will be of such a height as may be required by statute, or necessary because of physical conditions existing, or to protect other wires or structures rightfully upon the said right of way; that the poles will be about ten (10) inches in diameter at the base, planted from four (4) to eight (8) feet in the ground, according to the length of the poles, and in such positions upon said right of way as safe and proper

construction permit; the poles to be placed upon that portion of said right of way between a line five feet from the outer edge thereof and a line twenty-five feet from the center of the main track, except where the right of way may be less than sixty feet in width, or where the location of the main track upon the right of way, or the location of buildings, tracks or other improvements or obstructions upon the right of way may make it impossible to place the poles upon that portion of the right of way above described, in which event the poles will be placed upon the most practicable remaining portion of the right of way consistent with the safe and proper construction of said telegraph line, such portion of said right of way to be designated by said railway company or its lessees, so as not to interfere with the ordinary travel or use of said railroad; that the poles will be set about one hundred and sixty-five (165) feet [5] apart, making a total of thirty-two (32) to thirty-five (35) poles to the mile, excepting at sharp angles, where they may be not less than seventy-five (75) feet apart, and around curves, where they may be from one hundred and seventeen (117) to one hundred and thirty-one (131) feet apart; the poles to be equipped with cross-arms about ten feet long, at or near the top of the poles, fastened at about the middle of the cross-arms to the poles, and along and upon said cross-arms or poles, or upon said cross-arms and poles, will be strung a sufficient number of wires to transact such business as will be given to the telegraph company by the United States Government and the public. That

said line of poles and wires will be so constructed, maintained and operated as not to interfere with the ordinary travel or use of said railroad.

VIII.

This petitioner further avers that the only lands that will be actually taken or occupied by it by virtue of this proceeding will be about one square foot for each pole; that the space between the poles and under the wires can be used by said railway company or its lessees for all purposes for which it has heretofore been used; that wherever it becomes necessary for said telegraph line to cross said right of way the said crossing will be made by having its poles at such crossing so erected and its wires so insulated and strung so high above said railroad track as to prevent any injury to or interference with the employees or property of the said railway company; and this petitioner further stipulates that its said telegraph line will not interfere with any other telegraph or telephone line now rightfully upon said right of way. That if at any time the said railway company, its successors or [6] lessees, shall require for railroad purposes the immediate use of any of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, this petitioner will, at its own expense, remove its line to some other place, to be designated by said railway company, adjacent thereto, on such right of way, so as not to interfere with the use of said right of way for railroad purposes. That said telegraph line will not be erected on any embankment or slope or any cut of said right of way, without the

consent of said railway company ; and if at any time said railway company or its lessees shall require its entire right of way for railroad purposes at any point, the telegraph company will at such point or points remove its line entirely off said right of way.

VIII.

That the defendant denies the right of this petitioner to maintain and operate its said telegraph line along, over and upon the right of way of said railway company, after the expiration of the contract hereinbefore mentioned, to wit, February 17, 1913, and petitioner avers that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00).

WHEREFORE, your petitioner prays that a jury may be impaneled to ascertain and determine the compensation to be paid in money, irrespective of any benefit from the said telegraph line, to the above-named defendant, and to all persons interested, whether as tenants, incumbrancers, or otherwise, for the taking or injuriously affecting of said lands, or in [7] case a jury be waived, that the compensation be ascertained by this Court, or a Judge thereof, and that a judgment or decree of appropriation of said easement may be made and entered herein.

POSTAL TELEGRAPH-CABLE COMPANY OF WASHINGTON.

By J. A. FOREHAND,

Its President.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Petitioner.

State of Washington,
County of King,—ss.

J. A. Forehand, being first duly sworn, on oath deposes and says: That he is the President of the Postal Telegraph-Cable Company of Washington, petitioner in the above-entitled proceeding; that he makes this affidavit in verification of the foregoing petition on behalf of said petitioner; that he has seen and read the said petition, knows the contents thereof, and believes the same to be true.

J. A. FOREHAND.

Subscribed and sworn to before me, this 24th day of May, A. D. 1912.

[Seal]

H. J. RAMSEY,

Notary Public in and for the State of Washington,
Residing at Seattle. [8]

Indorsed: Petition. Filed in the U. S. District Court, Western District of Washington. May 27, 1912. A. W. Engle, Clerk. By S., Deputy. [9]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Notice and Summons.

The President of the United States of America,
Greeting: To the Northern Pacific Railway
Company, a Corporation, Defendant:

You are hereby notified that the Postal Telegraph-Cable Company, a corporation, petitioner herein, has filed its petition in the above-entitled court to condemn and acquire an easement and privilege along, upon and over the right of way of the said Northern Pacific Railway Company, for the construction or reconstruction and for the maintenance and operation of a telegraph line from the intersection of Evanston street near Fremont station, in the city of Seattle, State of Washington, through the counties of King, Snohomish, Skagit and Whatcom in said State, to the international boundary line at the north end of the depot building of said railway company in the town of Sumas, in said county of Whatcom; its poles to be erected as near the outer edge of said right of way as circumstances will permit and in such position as not to interfere with the operation or safety of trains or with the use of the right of way by the said railway [10] company or its lessees for its or their own purposes; and this petitioner proposes in said proceedings to condemn so much of the said right of way between the points and through the counties aforesaid as may be necessary for its uses for the purpose of constructing or reconstructing, maintaining and operating its telegraph line along, upon, over and across said right of way; a copy of which petition is hereunto at-

tached, and hereby referred to for a more full and complete statement of the objects thereof and the description of said right of way.

You are further notified that said petition will, on the 10th day of June, A. D. 1912, at the hour of ten o'clock A. M. on said day, or as soon thereafter as counsel can be heard, be presented to the Judge of said Court in the Federal courtroom in the city of Seattle, Washington; and at such time and place as may be then prescribed by said court, the said petitioner will submit proof, as prescribed by law, of the matters and things alleged in the said petition.

Witness, the Hon. C. H. HANFORD, Judge of said court, this 27th day of May, in the year of our Lord one thousand nine hundred and twelve and of our independence the one hundred and thirty-sixth.

[Seal]

A. W. ENGLE,

Clerk.

By F. A. Simpkins,

Deputy Clerk.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Petitioner. [11]

Return on Service of Writ.

United States of America,

Western District of Washington,—ss.

I hereby certify and return that I served the annexed Notice and Petition on the therein named Northern Pacific Railway Company by handing to and leaving a true and correct copy thereof with J.

O. McMullen, City Passenger Agent of the said Northern Pacific Railway Company personally at Seattle, in said District, on the 27th day of May, A. D. 1912.

JOSEPH R. H. JACOBY,

U. S. Marshal.

By Fred M. Lathe,

Deputy.

May 28, 1912.

Fees: \$2.12.

Indorsed: Notice and Summons. Filed in the U. S. District Court, Western Dist. of Washington, May 28, 1912. A. W. Engle, Clerk. By S., Deputy.
[12]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY, OF
WASHINGTON, a Corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Notice of Appearance [of Defendant, etc.].

To the Above-named Petitioner, and to Its Attorneys, Messrs. Hughes, McMicken, Dovell & Ramsey:

You and each of you will take notice that the de-

fendant, Northern Pacific Railway Company, a corporation, hereby enters its appearance herein through its attorney, Mr. C. H. Winders;

And you are notified that all pleadings and papers in said cause from this date are to be served upon said attorney at his address below stated.

Dated at Seattle, Washington, this 10th day of June, 1912.

C. H. WINDERS,
Attorney for Defendant.

712 Lowman Building,
Seattle, Washington.

Indorsed: Notice of Appearance. Filed in the U. S. District Court, Western Dist. of Washington, June 10, 1912. A. W. Engle, Clerk. By S., Deputy. [13]

**[Order Directing Impanelment of Jury to Ascertain
and Determine Compensation, etc.]**

*In the District Court of the United States, for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY, OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

ORDER ADJUDICATING NECESSITY.

The petition of the Postal Telegraph-Cable Company of Washington, a corporation of the State of Washington, for the appropriation of certain lands in said State for the purpose of the construction, maintenance and operation of a telegraph line, having come on to be heard before the Court, and it appearing by satisfactory proof that all parties interested in the land to be appropriated for said purposes, as described in said petition, to wit:

An easement or privilege along, upon and over the right of way of said Northern Pacific Railway Company, for the construction or reconstruction and for the maintenance and operation of its said telegraph line from the intersection of Evanston street, near Fremont station, in the City of Seattle, through the counties of King, Snohomish, Skagit and Whatcom, to the international boundary line at the north end of the depot building of said railway company in the town of Sumas, in Whatcom County, Washington; its poles to be erected as near the outer edge of said right of way as circumstances will permit and in such position as not to interfere with the operation or safety of trains or with the use of the right of way by said railway company, or its lessees, for its or their own purposes; said telegraph line to be constructed and reconstructed of the best material and by the most approved methods of construction and to consist of a single line of poles not less than twenty, nor more than thirty feet in length, including length underground, except at highways

or where obstructions exist, where the poles will be of such height as may be required by statute or necessary because of physical conditions [14] existing or to protect other wires or structures rightfully upon said right of way; said poles to be about ten inches in diameter at the base, planted from four to eight feet in the ground, according to the length of the poles, and in such position upon said right of way as safe and proper construction will permit; the said poles to be placed upon that portion of said right of way between a line five feet from the outer edge thereof and a line twenty-five feet from the center of the main track except where the right of way may be less than sixty feet in width, or where the location of the main track upon the right of way, or the location of buildings, tracks or other improvements or obstructions upon the right of way may make it impossible to place the poles upon that portion of the right of way above described, in which event the poles will be placed upon the most practicable remaining portion of the right of way consistent with the safe and proper construction of said telegraph line; such portion of said right of way to be designated by said railway company or its lessees, so as not to interfere with the ordinary travel or use of said railroad; the said poles to be set about one hundred and sixty-five feet apart, making a total of thirty-two to thirty-five poles to the mile, excepting at sharp angles, where they may be not less than seventy-five feet apart, and around curves, where they

may be from one hundred and seventeen to one hundred and thirty-one feet apart; said poles to be equipped with cross-arms about ten feet long at or near the top of the poles, fastened at about the middle of the cross-arms to the poles, and along and upon said cross-arms or poles, or upon said cross-arms and poles, to be strung a sufficient number of wires to transact such business as will be given to the telegraph company by the United States Government and the public; said line of poles and wires to be so constructed, maintained and operated as not to interfere with the ordinary travel or use of said railway;

have been duly served with notice or have appeared as prescribed by law, and said petitioner having appeared by its attorneys, Hughes, McMicken, Dovell & Ramsey, and the defendant Northern Pacific Railway Company, having appeared by its attorney, C. H. Winders, and the Court having heard the evidence submitted thereon, and being duly advised in the premises, finds that the contemplated use for which said land is sought to be appropriated is really a public use and that the public interest requires the prosecution of such enterprise and that the land sought to be appropriated herein is required and necessary for the purposes of the construction, maintenance and operation of said telegraph line; [15]

NOW, THEREFORE, it is hereby ordered that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by said

petitioner, to the owners of the land described in said petition and to all tenants, incumbrancers and others interested therein, for the taking or injuriously affecting such land, or, in case a jury be waived as in other civil cases in courts of record, in the manner prescribed by law, then that the compensation to be made, as aforesaid, be ascertained and determined by the Court or Judge thereof.

Done in open court, this 17th day of June, A. D. 1912.

C. H. HANFORD,
Judge.

O. K. as to form.

C. H. W.

Indorsed: Order Adjudicating Necessity. Filed in the U. S. District Court, Western Dist. of Washington. June 17, 1912. A. W. Engle, Clerk. By S., Deputy. [16]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY
OF WASHINGTON, a Corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Verdict.

We, the jury duly impaneled in the above-entitled cause, do find that the compensation to be paid in money, irrespective of any benefit from the proposed telegraph line of the petitioner, to the above-named defendant, Northern Pacific Railway Company, and all persons interested, whether as tenants, encumbrancers, or otherwise, for the taking or injuriously effecting of the lands described in the petition and order adjudicating necessity, is the sum of \$15,000.00.

B. R. BRITTON,

Foreman.

Indorsed: Verdict. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 22, 1912. Frank L. Crosby, Clerk. F. A. Simpkins, Deputy.
[17]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY, a
Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

**Memorandum of Costs and Disbursements to be
Taxed in Favor of the Defendant and Against
the Petitioner.**

Clerk's fees.....	
Attorney's fees.....	\$20.00
Reporter's fees.....	20.00
Witness' fees:	
C. E. Perkins, Tacoma, 3 days, 72 miles.....	\$ 8.10
Joseph Smith, Tacoma, 4 days, 72 miles....	9.60
S. M. Smith, Seattle, 3 days, 2 miles.....	4.60
J. E. Craver, Seattle, 4 days, 2 miles.....	6.10
Ralph Morris, Seattle, 4 days, 2 miles.....	6.10
E. E. Dildine, St. Paul, 4 days, 180 miles..	15.00
W. H. Gale, Sedro Woolley, 4 days, 172 miles.....	14.60
F. Nibert, Snohomish, 1 day, 76 miles.....	5.30
H. F. Walton, Snohomish, 3 days, 76 miles..	8.30
Axel Gunderson, Bothell, 3 days, 44 miles..	6.70
John Walsh, Snohomish, 4 days, 76 miles...	9.80
Herman Riddell, Hartford, 4 days, 92 miles..	10.60
A. J. Rhodes, Arlington, 4 days, 120 miles...	12.00
W. E. Vender, Deming, 3 days, 240 miles..	16.50
Total.....	

United States of America,
Western District of Washington,—ss.

C. H. Winders, being first duly sworn, on oath deposes and says: That he is attorney for the defendant Northern Pacific Railway Company in the above-entitled cause, and as such has knowledge of the facts as hereinabove set forth; that the items in the above

memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause, and that the services charged therein have been actually and necessarily performed as therein stated.

C. H. WINDERS.

Subscribed and sworn to before me this 23 day of November, 1912.

[Seal]

F. C. REAGAN,
Notary Public in and for the State of Washington,
Residing at Seattle. [18]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY, a
Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

To the Above-named Petitioner and to Messrs.
Hughes, McMicken, Dovell & Ramsey:

You and each of you will take notice that the defendant will make application to the clerk of the above-entitled Court on Monday morning, the 25th day of November, 1912, at the hour of ten o'clock

A. M., to tax the costs in this proceeding in favor of the defendant, copy of its memorandum of costs being served upon you herewith.

C. H. WINDERS,

Attorney for Defendant Northern Pacific Railway Company.

Due service of the within Cost Bill and Notice acknowledged and a true copy received this 23d day of Nov., 1912.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Petitioner.

Indorsed: Notice and Memorandum of Costs. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 25, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [19]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Motion for a New Trial.

Comes now the petitioner and moves the Court to vacate the verdict of the jury returned in this cause

and to grant a new trial thereof, for the following causes:

I.

Irregularity in the proceedings of the Court and of the defendant materially affecting the substantial rights of the petitioner.

II.

Misconduct of counsel for the defendant.

III.

Excessive damages appearing to have been given under the influence of passion and prejudice.

IV.

Insufficiency of the evidence to justify the verdict of the jury.

V.

That the verdict of the jury is against the law.
[20]

VI.

Error in law occurring at the trial and excepted to at the time by the petitioner.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Petitioner.

Copy of within Motion received, and due service of same acknowledged this 16th day of Dec., 1912.

C. H. WINDERS,

Atty. for Deft.

Indorsed: Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington. Dec. 17, 1912. Frank L. Crosby, Clerk. By E. M. L., Deputy. [21]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Order Overruling Plaintiff's Motion for New Trial.

BE IT REMEMBERED that this cause came on heretofore duly and regularly for hearing upon the motion for new trial of the petitioner, Postal Telegraph-Cable Company of Washington, a corporation, the said petitioner appearing by its attorneys, Messrs. Hughes, McMicken, Dovell & Ramsey, and the defendant by its attorney, Mr. C. H. Winders; and the matters set forth in said motion for new trial being duly and regularly submitted to the Court, and counsel for both parties having presented their argument, said motion was taken under advisement, and the Court having heretofore considered the same and entered its memorandum opinion denying said motion; now, then, upon motion of the defendant it is by the Court ORDERED, ADJUDGED AND DECREED that the motion for new trial heretofore filed by the petitioner Postal Telegraph-Cable Company of Washington, a corporation, be and the same is in all things overruled and denied, to all of which

petitioner excepts and an exception is expressly allowed.

Dated at Seattle, Washington, this 19th day of February, 1913.

CLINTON W. HOWARD,

Judge.

O. K. Form.

HUGHES, McM. D. & R. [22]

Indorsed: Order Overruling Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 19, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [23]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Judgment.

BE IT REMEMBERED that this cause came on regularly for hearing and trial in the above-entitled court on the 19th day of November, 1912, before the Honorable Clinton W. Howard, Judge of said court, and a jury impaneled to ascertain and determine the

compensation to be made in money, irrespective of any benefit from any improvement proposed by said petitioner, to the said defendant, Northern Pacific Railway Company, as owner of the land described in said petition, for the taking or injuriously affecting such land, in the manner prescribed by law, and pursuant to the order adjudicating the necessity made and entered by said Court on the 17th day of June, 1912; and said petitioner having appeared by Hughes, McMicken, Dovell & Ramsey, its attorneys, and the defendant having appeared by C. H. Winders, its attorney, the following proceedings were thereupon had, to wit:

A jury was thereupon duly and regularly impaneled and sworn to try the above-entitled cause, and the evidence [24] was submitted by witnesses duly and regularly sworn by and on behalf of the petitioner and defendant herein; and after all the evidence was taken and after arguments were made by the respective counsel herein for and on behalf of the petitioner and the defendant, the jury were duly and regularly instructed by the Court, and said jury retired to consider and deliberate upon their verdict; thereafter, on the 22d day of November, 1912, the said jury returned into court its verdict ascertaining, finding and awarding damages in favor of the said defendant for the taking and injuriously affecting of the land described in the petition of the petitioner on file herein in the sum of fifteen thousand dollars (\$15,000.00); and thereafter a motion for a new trial having been duly and regularly filed herein in the manner and within the time provided by the

rules of this court, and the Court having thereafter on the 19th day of February, 1913, overruled said motion;

NOW, THEREFORE, it is hereby ORDERED AND ADJUDGED by the Court that the amount of compensation to be paid by the petitioner to the defendant herein for the taking and injuriously affecting of the lands described in the petition herein by the construction, reconstruction, maintenance and operation of the petitioner's telegraph line in the manner and upon and under the conditions and stipulations in said petition set forth and described, be and is hereby fixed and determined at the sum of fifteen thousand dollars (\$15,000.00); and that upon the payment of said sum to the defendant, with interest thereon at the rate of six per cent per annum from the date of said verdict, into the court for the benefit of the defendant, together with the costs of said suit taxed at [25] the sum of \$———, said petitioner shall be entitled to a final decree of appropriation appropriating to its use for the purposes specified in its said petition and upon the conditions and stipulations therein set forth the easement or right of way for its said telegraph line as described in its said petition and in the aforesaid order of this Court of June 17, 1912.

Done in open court this 3d day of March, A. D. 1913.

By the Court:

CLINTON W. HOWARD,
Judge.

O. K.—C. H. W.

Indorsed: Judgment. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [26]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that heretofore, to wit, on November 19, 1912, the above-entitled cause came regularly on for trial in the above court before the Honorable Clinton W. Howard, Judge of said Court, sitting with a jury; the petitioner appearing by E. C. Hughes of Hughes, McMicken, Dovell & Ramsey, and the defendant appearing by C. H. Winders;

And thereupon the following proceedings were had and done, to wit:

The jury having been first duly impaneled and sworn, the petitioner, to maintain the issues on its part, introduced and offered in evidence the following testimony, to wit:

Counsel for the defense admits the averments of

paragraphs I and II of the petition, and all of paragraph III except as to the width of the right of way.
[27*—1†]

[Testimony of J. G. Blake, for the Petitioner.]

J. G. BLAKE, being first duly sworn, testified on behalf of petitioner as follows:

Direct Examination.

Q. (By Mr. HUGHES.) State your name.

A. J. G. Blake.

Q. What is your business, Mr. Blake?

A. I am general superintendent of the Pacific Division of the Postal Telegraph-Cable Company, with headquarters at San Francisco, California. I have held that position since June, 1908, and prior thereto was assistant general superintendent for a little over a year. Prior to that time I was in Seattle eighteen years in the employ of the same company, for the first thirteen years as manager of the Seattle office and for the remaining five years as district superintendent. I had charge of the line repairs from Seattle to Sumas.

Q. You have been acquainted with the telegraph line on the right of way of the defendant road between Seattle and Sumas for how long?

A. Ever since the line was built. Portions of it were built in 1889-90-91, and the section between Fremont and Bothel was built in 1896. I am familiar with the right of way of the railroad company between Seattle and Sumas on which this tele-

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

(Testimony of J. G. Blake.)

graph line is located.

Q. Describe as nearly as you can that right of way and its width in different parts.

A. Beginning at Fremont there is none of it less, I believe, than fifty feet in the total width with the exception of, [28—2] I believe, we have a strip through the University grounds where they have no right of way at all. And there is a short section north of Lake Station, where they have but twenty-five feet on the west side, unless they have bought it recently—I think that is where our poles are in the Lake—on the east side of the lake. From there, I think, within a short distance this side of Bothel the right of way again is one hundred feet and is one hundred feet or more, with very few exceptions, all the way from there to Sumas—there are a few short sections where it is only fifty feet. The Western Union Telegraph Company has a line on the same right of way from Fremont to Sedro Woolley. From Sedro Woolley to Sumas there is only the one line.

Q. Describe the manner in which the telegraph line is constructed and is to be reconstructed and maintained.

A. The poles vary from twenty-five to thirty feet in length and in some cases where there are obstructions they are longer, and they are set about an average of thirty-five to the mile—from one hundred and fifty to one hundred and sixty-five feet apart. They are braced or guyed on all curves, to hold the strain. They are set from four to eight feet in the ground,

(Testimony of J. G. Blake.)

depending upon the length of the pole. The diameter of the pole, say four or five feet from the ground, would average about ten inches. On sharp angles the poles are closer together, say seventy-five feet, and from that up to one hundred and fifteen and one hundred and thirty feet on curves.

Q. Where there is any strain by reason of the angle in the road or a sharp curve, in what manner do you sustain [29—3] the poles?

A. On the present construction we put in a guy which is attached to what we call an anchor rod, which is anchored in the ground by a dead man. The guy wire reaches from the top of the pole to the anchor rod, which is set anywhere from five to ten feet from the base of the pole—five feet is generally sufficient.

Q. Now, explain the manner in which the cross-arms and insulators and wires are constructed and maintained upon the line.

A. The cross-arms are fastened to the poles with a center bolt from a half an inch to five-eighths of an inch in diameter and there are two braces made in a "V" shape reaching from the cross-arm to nearly two feet below it. The cross-arms are placed two feet apart, from center to center, and the braces are just long enough to reach between them. These are fastened to the cross-arms by a three-eighths or a quarter inch bolt, and the heel of the brace is fastened to the pole with a four inch lag screw. The cross-arms carry pins to which are attached the insulators and the wires tied to the insulators with

(Testimony of J. G. Blake.)

what we call a tie wire.

Q. Are these poles, and cross-arms and wires constructed so as to be secure against falling or injury or damage? A. Yes.

Q. Where you have occasion to cross the track with wires from one side to the other for any reason, because of physical conditions or because of the desire of the railroad company, in what manner can that be done? [30—4]

A. To have the poles of sufficient length to clear the rail with the Northern Pacific Railroad requirement, which is twenty-two feet—we usually make it higher than that, from twenty-five to thirty—we have poles that are always extra well guyed at such crossings.

Q. In the course of your duties were you frequently required to pass over and along this road and this right of way and inspect the right of way and your telegraph line and wires?

A. I was over the right of way very frequently up to five years ago. I have been over it about once a year since then, I think.

Q. Have you ever known of any instance where the existence of your telegraph line has caused any interruption to the operation of the railroad?

A. No, sir.

Q. Or any interference with the uses and operation of the railroad, or of the use of the right of way for railroad purposes? A. No, sir.

Q. Has there ever been any instance within your knowledge as a telegraph operator, where the pres-

(Testimony of J. G. Blake.)

ence of the telegraph line constructed and maintained as it is here proposed to construct and maintain this telegraph line, has interfered with the railroad company's use of its right of way for railway purposes? A. No, sir.

Q. What damage or diminution in the value of the use of this right of way by this railway company or its successors in interest, in the use and operation of the right of way for any railway purpose, would be occasioned or is occasioned by the appropriation of the right to construct [31—5] and maintain a telegraph line as proposed in this petition—you heard the petition read by me and you know its contents, do you? A. Yes.

Q. Now, please answer the question.

(Objection being made on the ground, among other things, that the witness had not shown that he was qualified to answer the question, the objection was sustained upon the above specified ground.)

Q. What experience have you had in the telegraph business and in supervising and looking after construction, maintenance and operation of telegraph lines?

A. I was connected with telegraph companies in that relation for twenty-six years.

Q. During that time has it been a part of your business to be familiar with the uses of the railway right of way for railroad purposes as well as the uses of the same railway right of way for telegraph lines?

A. I am familiar with it.

Q. Have you, during that time, been familiar with

(Testimony of J. G. Blake.)

the negotiations for acquiring the right of way for telegraph lines by your company over the rights of way of railway companies? A. Yes, sir.

Q. Have you conducted such negotiations for fixing and determining upon the price, if any, to be paid? A. I have.

Q. Have you repeatedly qualified as a witness in cases to testify respecting the effect of the construction, and maintenance of a telegraph line on the uses of the right of way by the railroad company, and the diminution, [32—6] if any, in the value of the right of way of the railway company for railway purposes? A. I have in one case.

Mr. HUGHES.—I now ask that the question be read to the witness.

(Whereupon the stenographer reads the question to the witness as follows:)

Q. What damage or diminution in value of the use of this right of way by this railway company or its successors in interest, in the use and operation of the right of way for any railway purpose, would be occasioned or is occasioned by the appropriation of the right to construct and maintain a telegraph line as proposed in this petition?

By Mr. WINDERS.—Objection renewed.

The COURT.—Has he had any experience in the construction and operation of railroads?

The WITNESS.—No, I have had no experience in railroading.

The COURT.—Is the question specifically confined to this right of way and the damage to be

(Testimony of J. G. Blake.)

done to this specific right of way?

Mr. HUGHES.—Yes.

The COURT.—I will overrule the objection.

A. It would be merely nominal—no actual damage.

Cross-examination.

Q. (By Mr. WINDERS.) Mr. Blake, about how much space does one of those poles and the guy wires take up—how far out from the base of the pole is your guy wire? [33—7]

A. Five to ten feet.

Q. You set your pole up and then you have the guy wire extending down? A. Yes, sir.

Q. It would extend about ten feet from the bottom of the pole?

A. On the curves and places like that where it is necessary to guy.

Q. Take it between Snohomish and Fremont Station, what proportion of your poles are guyed?

A. I could not tell you.

Q. Give the jury your best judgment.

A. I never counted them. I should judge over forty per cent. It is rather a crooked road through there.

Q. And those poles at this time are in distance from the main track from ten to fifteen or twenty feet? A. Yes, sir, from ten to twenty-five feet.

Q. Is there a single industrial track between the city of Fremont and the town of Sumas, a distance of one hundred and twenty-six miles, where your poles are not now set between the main running

(Testimony of J. G. Blake.)

track and these side tracks and switches?

A. Yes, there are some.

Q. Can you name one?

A. I think at Sedro Woolley.

Q. Your poles within the town of Sumas, starting at the International boundary line, are on the very edge of the right of way?

A. They are just back of the depot there—they are about thirty-five or forty feet from the main line, I should judge. [34—8]

Q. Is it not true that in the town of Sumas your poles are set within six feet of the team track that handles all the business in that town?

A. I could not say that, but there is no doubt that they are because it is permitted by the railroad company.

Q. Did you ever notice where the people who do business with the Northern Pacific Railway Company within the town of Snohomish, take delivery?

A. I have not.

Q. Well, there is a track behind the depot?

A. On the west side of the depot?

Q. Yes, back of the depot—your pole line extends along that track? A. Yes, sir.

Q. It is your opinion that those poles which are within five or six feet of the delivery tracks where deliveries are made and where the train crews are working in making their deliveries and spotting is absolutely a nominal damage only to the company?

A. Yes.

Q. Mr. Blake, in going over the right of way on

(Testimony of J. G. Blake.)

your annual trip, how did you go?

A. On the train.

Q. Have you ever had any experience in maintaining a right of way either for a pole line or a railroad right of way? A. No, sir.

Q. Have you ever had any experience that would enable you to advise the jury of the expense of maintaining a railroad right of way with the poles on and with the poles off? [35—9]

A. No, sir, except my observation as a telegraph man.

Q. State to the jury the character of the country through which this line runs, as to whether or not it is timbered or otherwise.

A. It is mostly timbered. I believe the right of way has been cleared of timber throughout.

Q. Now, in maintaining and constructing and reconstructing this telegraph line, how much of this right of way would you traverse?

A. The full distance, north and south.

Q. I am talking about the width?

A. A man would have to walk from pole to pole wherever it is most convenient for them to walk.

Q. When were you over this line last?

A. About a month ago.

Q. Are you familiar with the work that is now in progress on this line?

A. No, sir; I noticed men were working there.

Q. Do you believe that, in making fills and in tamping our grades and dumping earth around these poles without knocking them over, the company men

(Testimony of J. G. Blake.)

can go along there and make those improvements just as easy without devoting any more time than if your poles were not there?

A. Well, the poles are removed when they want to do work of that kind.

Q. How many men do you keep along this line and where are they located?

A. One man in Seattle, one at Snohomish, one at Sedro Woolley and one at Sumas, for what we call "trouble" men. They go out and make repairs when the wires are down—that is [36—10] their principal duty. We have five wires from here to Snohomish, and four from Snohomish to Sumas.

Q. At Crescent mile post 123 how about the right of way there—as to the character of the growth and vegetation, and the like?

A. There is some timber in there and there is some cleared land between Nooksack and Sumas; it is comparatively level. The country has been timbered through there. A good deal of brush grows up there annually. At Nooksack mile post 119 our poles are located on the west side of the right of way, I could not say how far from the main track. At Deeming mile post 110 we run right through the depot platform. We had to cross over there in order to get the lines into the station for the railroad company.

At the Nooksack River we are on the west side of the right of way as we come south, then we cross to the east side of the right of way and we follow

(Testimony of J. G. Blake.)

on the east side until we get just south of the Acme depot.

Q. What is the fact as to whether or not your poles extend to these loading and unloading platforms? A. I could not say.

Q. Would you say that if they did, in the maintenance of the right of way on that cut and fill, and the maintenance of the log dump along there, that that would cause any inconvenience or other additional cost to the railroad company in the operation of its system or the maintenance of its right of way?

A. I would not think it would; but if it did, there could be a long span made there to clear it if they asked us to do it. [37—11]

Q. Are you willing to stipulate now to do that?

Mr. HUGHES.—We have already stipulated, if the Court pleases.

The COURT.—The stipulations contained in the petition are made a part of the decree.

WITNESS. (Answering questions asked by Mr. Winders.) I could not say as to the growth of brush in a year. I know it grows quite rapidly. I think a couple of years' growth would reach the telegraph wires. I have not had such experience as would enable me to say whether or not it costs any more to clear the right of way of this brush with the telegraph poles there than with them off.

Q. Do you know from your experience or observation as to whether or not a railroad company, or any company maintaining a right of way, is required

(Testimony of J. G. Blake.)

to expend more time or labor, or more additional expense in burning and clearing the right of way with poles on or with them off?

Mr. Hughes objected to this as not proper cross-examination.

(Objection overruled.)

A. I could not say.

Q. In making the answer to the question which you made, that there was no added expense to this company, you did not take into consideration those matters which I have referred to?

A. Not in detail.

Q. Mr. Blake, you spoke about the contract under which you are now operating. I wish you would examine that agreement and state whether or not that is the contract under which you are now operating. (Handing document to witness.)

Mr. HUGHES.—Objected to as not cross-examination.

(Objection overruled.)

The WITNESS.—Yes.

(Mr. Winders thereupon had the instrument marked "Defendant's [38—12] Exhibit 'C' for identification.")

Q. Have you any sufficient knowledge of the situation between here and Sumas to advise the jury as to whether or not, and if so, how frequently, in windstorms and the like, by the falling of trees along the right of way, your wires or poles are knocked down?

A. I could not say how often that happens.

(Testimony of J. G. Blake.)

Q. Are you sufficiently advised to give the jury an opinion as to how close to a telegraph pole a railroad company can construct a track with your ten foot cross-arm?

A. That depends on the height of the pole.

Q. Take your ordinary line as it exists to-day, and what you are stipulating in this petition.

A. Well, they could build it within six feet.

Q. You know that it is a dangerous proposition for the men who have to be up on the cars to get under wires or under the cross-arms?

A. It is not dangerous if the cross-arms are high enough to clear. I do not know of any main line having its track constructed within five or six feet of the telegraph poles. I know there are such sidings, but I could not name them. I know it is the standard rule with the Northern Pacific to clear sidetracks six feet with the poles. That means a clearance of six feet from the poles on either side.

Q. In stating your opinion to this jury of no damage, were you basing that upon conditions as they exist at this time in your pole line along the right of way? A. Yes.

Q. Conditions that are existing under this contract under [39—13] which you are operating?

Mr. HUGHES.—I object to that as irrelevant and immaterial—the conditions are those set forth in the petition.

The COURT.—I will sustain the objection.

Mr. WINDERS.—At this time, in view of the witness' answer, I offer in evidence this contract which

(Testimony of J. G. Blake.)

is marked "Defendant's Exhibit 'C' for identification," as part of the cross-examination.

Mr. HUGHES.—I object to it as irrelevant and immaterial to the controversy now being tried before this jurv.

(The Court reserved its ruling until a later time, when the objection was sustained.)

Redirect Examination.

Q. (By Mr. HUGHES.) Mr. Blake, you have been asked certain questions as to existing conditions at certain places, and I understand you to say that where your poles were put in there it was for the purpose of connecting with the stations?

A. It was particular places we had to go to the station.

Q. At present and in the past you have connected with the stations? A. Yes.

Q. In the future, and after this condemnation, if they should use the Western Union or any other wire, it would not be necessary for you to maintain those poles at those places, and, in that event, I will ask you whether or not if they request it, your poles would be removed to such places as they might indicate upon their right of way, or if their right of way was entirely required, whether they would be removed off the right of way. [40—14]

Mr. WINDERS.—You are assuming several things that are not true. I will object to the question. There is no evidence in the case that we are using their wires up to Sedro Woolley.

The COURT.—There is no testimony to that ef-

(Testimony of J. G. Blake.)

fect. I will sustain the objection to the form of the question.

Q. (By Mr. HUGHES.) Mr. Blake, the jury will remember what your testimony was in regard to any places where your poles are now close to the station. I will ask you if after the expiration of this contract and after the taking effect of this condemnation proceeding, if required by the railroad company those poles would be removed to some other point indicated on their ground, or if they required all of the right of way for their uses, they would be removed entirely off their right of way.

A. Yes, sir. [41—15]

[Testimony of Horace Middaugh, for the
Petitioner.]

HORACE MIDDAUGH, having been first duly sworn, testified on behalf of the petitioner as follows:

My name is Horace Middaugh. I am sixty-six years old. I have been engaged in the railroad business about twenty-three years. I was on the canal department of the Pennsylvania Railroad from 1875 to 1885. I was engaged with the Seattle, Lake Shore & Eastern Railroad from 1889 to 1899 as superintendent of bridges, building and track. My duties were to look after the construction, repairs and rebuilding. While I was engaged on the Pennsylvania Railroad there were two telegraph lines on the right of way. On the Seattle, Lake Shore & Eastern Railroad there was only one—the Postal Telegraph line for the first three or four years, and after that the Western Union and Postal were both

(Testimony of Horace Middaugh.)

on the right of way as far as Sedro Woolley. This road is now a branch of the Northern Pacific and runs from Seattle through Snohomish and Sedro Woolley to Sumas.

During my experience I have never known of any injury or damage to the railway company in the operation of its trains or railway service in consequence of the presence upon its right of way of telegraph lines. I have known of poles to fall across the track when there was a very high wind, and we have also had trees across the track, too.

Q. Did that impose any added burden or inconvenience or damage to the railroad company?

A. Well, it would take a few minutes to throw the pole off.

Q. Did you ever know of any specific instance where a pole actually fell across the track during a storm, in connection with the falling of the trees?
[42—16]

A. Yes, I do. I recollect of one case when they had a very big wind, where a pole fell across the track up just below Getchell on our sharp curves.

Q. At the same time were there trees or other obstacles thrown across the tracks?

A. Well, we were twenty-four hours clearing the track all along there. After such violent storms the railroad company is required to clear the track as soon as possible and pass the trains.

Q. Would it be necessary even if there were no telegraph lines there? Would it be necessary to inspect the track in the same way to see that it was in a safe condition for the operation of the trains

(Testimony of Horace Middaugh.)

after storms? A. Yes; sure.

Q. Does it impose any added burden because there is a telegraph line along the right of way? I mean in the way of care and inspection of your track and keeping it in proper condition for the operation of trains.

A. It would be an added burden if there were no telegraph men to attend to it.

Q. Is there any added expense or burden to the railway company in consequence of the presence of the telegraph line upon its right of way, because of occasional storms?

A. We always make it a business if the lines were torn down by the trees falling, that we immediately coupled them together, but we do that for our own benefit as much as anybody's else, so that we could get in communication with headquarters.

Q. Mr. Middaugh, in the light of your knowledge and experience in the railroad service as explained by you, what would you say would be the injury or damage in the [43—17] diminution of the value of the use of a railroad right of way for railroad purposes, the operation and use of the trains and general necessary railroad purposes which would be caused by the construction and maintenance of a telegraph line in the manner provided by this petition which was read in your hearing? Would it cause any injury or damage, and, if so, what—that is, to what extent?

Mr. WINDERS.—I object to this question on the ground that he has not shown himself qualified or

(Testimony of Horace Middaugh.)

familiar with the duties imposed upon railroad companies since 1899, or with the maintenance of this track.

The COURT.—The question is a general one as to railroads under such conditions for the removal of poles, etc., as are set forth in the petition.

(Objection overruled.)

A. Well, I consider that there would not be any damage.

Q. Mr. Middaugh, from your knowledge of the right of way on this line from Seattle to Sumas, what would you say as to whether the construction and maintenance of a telegraph line would cause any injury or damage to the use and operation of the right of way of the railroad company for railroad purposes—if so, what?

Mr. WINDERS.—I object to that on the ground that the witness has not shown himself to be qualified.

The COURT.—I will sustain the objection. I think his knowledge of this particular line is confined to too remote a period.

(Exception allowed.)

Cross-examination.

Q. (By Mr. WINDERS.) Now, Mr. Middaugh, when were you last over that line?

A. It is several years. They cleared the line on construction. When I am speaking of timber I mean timber standing on the right of way or outside of the right of way; it is just constructed through the woods. [44—18]

(Testimony of Horace Middaugh.)

Q. While you were there did you have the obligation of keeping that right of way clean and clear of brush and grass and that sort of thing? A. Yes.

Q. I wish you would state what the allowance is per pole on that line for the expense of cleaning around it, pulling back the brush, and then the added expense of watching the poles and wires while you are burning the debris per pole.

A. I do not consider the poles would add any extra expense.

Q. It is your testimony, then, to the jury that these section men, in clearing the right of way, can clear around the poles, and that the expense of pulling the brush back from the poles, taking it from under the wires and having the section men watch those poles and wires while it burns, does not cost the company any more money?

A. For this reason: you have your right of way fenced and you have to take it away in order to protect your fences.

Q. We have to take it away from the fence?

A. And naturally, when you take it away from the fence you take it away from your poles. Now, another thing; a pole does not catch fire as easy as your fence does.

Q. Do you know of a single pole between Fremont Station and the station at Sumas that has not been on fire at one time or another in clearing that right of way?

A. Yes, I do, and I know why it caught fire, too. The chances are it catches fire from your engines.

(Testimony of Horace Middaugh.)

Q. What is the purpose of clearing the right of way? A. To prevent fire.

Q. Do you want this jury to understand that this company maintaining its poles on a strip about five feet of the outer edge of the right of way up to within twenty-five [45—19] feet of the track, the poles, as you know, not being on an average of more than twenty feet from the track—that our men can go along where that brush grows nine or ten feet high, and not be interfered with any by reason of the poles being in the road; no additional time taken in pulling the stuff back from the poles; no additional expense in watching those poles from burning?

A. I say it don't require any additional expense. Now, why I say it don't require any additional expense is that it is so small it would hardly be counted. It costs you from a dollar and a half to six dollars an acre, according to the time you let it go, to clear the right of way of brush, etc. The difference with the railway company is that they don't clear it every year—they let it go too long.

Q. I am assuming here that we are complying with the law, and these people are getting a permanent right, and if we burn down one of their poles we would pay for it.

A. If you take it in time you can clear it for a dollar and a half an acre.

Q. Mr. Middaugh, as a railroad man I will ask you, would the presence of those poles within five or six feet along the team track where deliveries are

(Testimony of Horace Middaugh.)

made and cars are loaded, in any way interfere with the service?

A. Yes, sir; they should not be there.

Q. Have you been connected with the railroad service since 1899?

A. Well, not since 1900. I have not been over this line farther than Sedro Woolley in five or six years. I took charge of this line in March, 1889, and was acting as roadmaster from 1894 until 1899. At the time [46—20] I quit the Northern Pacific was operating the line.

Redirect Examination.

Q. (Mr. HUGHES.) Did you testify that in your experience in the cost of the keeping clear of brush of the right of way that the entire right of way would be a dollar and a half to six dollars per mile?

A. No, sir; per acre.

Q. That covered the whole of the right of way?

A. That covered the whole right of way.

Q. Would the presence of telegraph poles add any appreciable amount to that expense? A. No.

Recross-examination.

Q. (By Mr. WINDERS.) Can you give the jury some estimate in cents per mile per year for protecting those poles—added expense by reason of those poles being there, figuring the time of your men?

A. Well, I would say it would be very small.

Q. Would it be thirty cents?

A. It might come to thirty cents.

[Testimony of J. A. Forehand, for the Petitioner.]

J. A. FOREHAND, having been first duly sworn, testified on behalf of the petitioner as follows:

My name is J. A. Forehand. I am superintendent of the Postal Cable Company, Second District, Pacific Division, embracing Oregon, Washington, Idaho and Montana. I am also superintendent of the plaintiff company in the operation of a line from Seattle to Sumas. I have [47—21] occupied the position of superintendent of this company since February, 1907. Prior to that time I was manager of the Seattle office from 1904 until I assumed the position of superintendent. Prior to that I was chief operator of the Seattle office, from 1895 to 1904. Previous to that I was operating in the Seattle office, from September, 1890. Prior to 1907 the principal supervision I had over this telegraph line on defendant's right of way was during the time I was chief operator, from 1895 to 1904.

I have heard the petition in this case read.

Q. (By Mr. HUGHES.) I wish you would explain briefly to this jury in what manner your poles would be erected and your wires strung and maintained.

A. The line will be constructed in what is termed and what will be a first-class manner. The poles will be set in the ground from the depth of four to four and one-half feet to eight or more feet, depending upon the length of the pole—the taller the pole the farther they must be set in the ground in order to be secure and safe from falling. On a straight line the poles will not need to be braced or guyed,

(Testimony of J. A. Forehand.)

but on sharp curves or sharp angles there will be a guy placed on each pole of sufficient strength to protect the line or protect the pole from being thrown over by wind or the pull of the wires—each pole will be properly guyed. The poles will have a ten-foot cross-arm placed within perhaps six or eight inches of the top of the pole. The cross-arm will be fastened to the poles with what is called a center bolt, a half-inch bolt that goes entirely through the pole and with a nut and washer on the back end of [48—22] the pole which will prevent its pulling out. Each cross-arm will have two braces extending from the arm to the pole, the two of them fastened together on the pole to prevent the slipping of the arm. The arms will have the usual tins and insulators upon which the wires will be fastened, the wires grooved in the insulator, that is, the wire is laid in this groove and the tie wire placed around the wire and around the insulator and around the wire again, to prevent its slipping off the wire; that is for insulation as well as to keep the wire in its proper place on the pole.

The purpose is to construct the line, where possible, within five feet of the outer edge of the right of way. Where it is not practical, owing to certain obstructions, we will be obliged to place it nearer the track, endeavoring at all times to keep at least twenty-five feet away from the center of the track. The reason that this is necessary is the fact that the railroad company may at some particular time wish to extend its tracks, or sidetrack or loading track

(Testimony of J. A. Forehand.)

somewhere that might get within five feet of the outer edge, and they would prefer to remove it farther in to the track, and, therefore, it would be necessary for us to move where the railroad company requested us to move to. Our intention is to keep within, as near the outer edge of the right of way as we can.

We will have our regular station linemen placed at various points along the line, whose duty it is to keep the line repaired. In case there should be a break on the wire or any interruption at all, it is noted in the main office as well as in all offices along the line. The [49—23] chief operator will immediately locate the trouble and order the lineman in the location to make the repairs. The lineman also will cover his particular beat, as we call it, or territory, on regular inspection trips. If there is anything irregular or anything that might possibly cause damage later on, it is corrected at the time. For instance, he may find, as often is the case, that a large tree—an old dead tree, for instance, which stands outside of the right of way which leans towards the line—he will get permission to cut the tree; go up the tree with a line and attach it to it and cut the tree and fall it away from the line. Were it not done, probably, in some big storm it would fall across the lines and break them down.

Q. Are those trees tall enough also to reach the tracks of the railroad company?

A. In many cases they would be. I would not say positively they would all do so. In many cases they

(Testimony of J. A. Forehand.)

would be likely to fall across the track as well as the wires. Those are the principal duties of the station linemen. If there should be a severe storm which would cause more than ordinary damage to the line, additional men would be sent to make the repairs and place the line in first-class condition.

Q. Mr. Forehand, in the construction and maintenance of this telegraph line in the manner proposed by the petition here what interference if any, would be occasioned to the railroad company in the operation of its trains or in the uses of its right of way for strictly railroad purposes?

Mr. WINDERS.—I will object to that question, on the ground [50—24] that the witness has not shown himself qualified to answer.

The COURT.—I think a little better foundation might probably be laid.

Q. Mr. Forehand, have you had charge of the operating end of your telegraph line for a number of years, of the lines now on this right of way?

A. Yes, sir. I have directed the men in the matter of alterations, repairs, maintenance and improvements. If there was any serious interference with the operation of the trains or road, it would certainly come to my office as superintendent. If there were any requests or complaints by the railroad company of interference or injury, they would be reported to me. I have made it my business to be familiar with the workings of our line and of the operations in reference thereto. The operation of trains would not come under my observation, except if there had

(Testimony of J. A. Forchand.)

been an interference in any manner; then it would be brought to my attention. I frequently go over the line and inspect it.

Q. You have heard the petition read in this case?

A. Yes, sir.

Q. I will ask you to state to the jury what, if any, injury or interference or damage to the defendant company in the maintenance or operation of its right of way for railroad purposes would be occasioned by the construction and maintenance of your telegraph line as therein proposed.

A. There would be no damage or interference to the operation of the road. [51—25]

Cross-examination.

I am president of the petitioner in this case and verified the petition.

Q. (By Mr. WINDERS.) When you drew that petition, you drew it, read it and considered it with reference to the stipulations and matters that you agreed to do? A. Yes.

Q. The matters which you are stipulated to do are set forth in that petition? A. Yes.

Q. In what way does the line which you propose to construct differ from the line which you have now constructed?

A. The line that we will construct will perhaps differ a little from the present line for the reason that the present line is an old one whereas the other will be a new one, and will be built of entirely new material when we build the new line. The method of construction will be similar except that the pres-

(Testimony of J. A. Forehand.)

ent manner of construction provides that we use guy wires instead of guy stubs, which was formerly considered a proper method of construction in guying the poles.

Q. You ask the right to occupy a space between the outer edge of the right of way and within twenty feet of the track? A. I believe that is correct.

Q. Taking in on the average, how far are you now from the center of the track?

(Objected to as immaterial, and objection overruled.)

A. I should judge that the average at the present time [52—26] is about twenty feet, taking the entire line.

Q. Would you insist, as president of this company, upon the right to set your poles between the main tracks and the switch tracks?

A. That would depend entirely upon circumstances. I cannot imagine an instance or circumstance where we would insist that we should be permitted to put them there. In fact, we would prefer that they not be there.

Q. How often in the last five years have you been over this line?

A. I should judge it would average about once every three months. I go over the line on the train. We have four men on the line between Seattle and Sumas. I have had no experience in maintaining a pole line along a railroad right of way except in connection with the present line.

Q. Do you say that the location of your poles, say

(Testimony of J. A. Forehand.)

in the four blocks just south of the International boundary line, causes no inconvenience, incumbrance or damage to the railroad company as at present laid?

(Objected to and objection overruled.)

A. I would say that it caused no inconvenience to the railroad company. Had it done so they would have asked us to move it.

Q. Is it your testimony, knowing the conditions as you do along the team and delivery tracks of the Northern Pacific Railway Company from Evanston Street near the station of Fremont to Fifteenth Avenue, where the University is and where the mill company is, that your poles caused no inconvenience or incumbrance to the [53—27] railroad company?

A. I can only answer that by saying, we have had at various times requests from the railroad company to remove our poles, for the reason that they were in the way.

Mr. WINDERS.—I insist on an answer to my question. A. No, sir.

Q. Is it your testimony also that beyond the University grounds to Bothel and Woodinville your poles caused no inconvenience or incumbrance or damage to the right of way?

Mr. HUGHES.—I make the same objection.

The COURT.—The objection is overruled.

A. I don't think it caused any damage.

Mr. HUGHES.—I want to call the Court's attention to the fact that my objection is founded upon

(Testimony of J. A. Forehand.)

the proposition that past conditions are not the subject of the trial here; but the conditions that are bound to be observed under this proceeding.

The COURT.—I concede that that is absolutely correct, but both parties have constantly referred to past conditions—and I am going to permit the question to be answered.

Mr. HUGHES.—I take an exception to the ruling and also to the statement that so far as the petitioner is concerned it has done so beyond the preliminary matters involved in its petition.

Q. State to the jury whether there are numerous sawmills, shingle-mills and other industries along this track from Sumas to Fremont which are served by spur tracks leading off from the main track. [54—28]

A. There are a number of sawmills.

Q. With reference to the Nooksack river bridge and the logging roads where your poles are located with reference to the unloading platform on the north side of the new bridge of the Nooksack river, is it not a fact that they extend on that fill of ours and they are extending now up through those various platforms along there?

A. They may be there in some places.

Q. Is it your testimony to this jury that that causes no inconvenience, incumbrance nor damage?

Mr. HUGHES.—I object to that as incompetent, irrelevant and immaterial under the issues herein presented.

The COURT.—I think it is under the theory of

(Testimony of J. A. Forehand.)

the petition but not according to the manner in which the case has been tried.

Mr. HUGHES.—May I have it understood that to all like questions my objection will go, and I am not to be understood as waiving the objection if not renewed nor as acquiescing in the Court's position that the case has been so tried on our part.

A. I would say no. The reason I say no is the fact that the poles are about one hundred fifty feet apart and that they are not unloading logs along every foot of that space; that if a pole was in the way we would be requested to move it, or the logs would be thrown on it and knock it off. Having had no notice from the railroad company we would consider the pole is not in the way and is not causing them any inconvenience.

Q. Are you familiar with the situation of your poles in the town of Snohomish? [55—29]

A. Yes, sir.

Q. Where are they located with reference to the team and delivery track of the company?

A. Some of them are nearer than twenty feet to the delivery tracks. None of them are nearer than six feet. Starting at the coal-bunkers, from Third to Fourth and Fifth streets, beyond where the stock-yards are, the poles are about one hundred and thirty to one hundred and fifty feet apart. They are not an inconvenience or incumbrance to the railroad company.

The chief dispatcher would be advised of any interruption of our wires. If poles would cause any

(Testimony of J. A. Forehand.)

interruption in the use of the roadbed, our chief operator would be notified.

Redirect Examination.

Q. (By Mr. HUGHES.) Mr. Forehand, you have been asked as to the conditions at Sumas and you have testified in your opinion the poles are not an interference. Have you ever been asked by the railroad company to move those poles or alter their position?

A. We have not received any request from the company to move those poles from where they now stand. The Western Union also has a line on its right of way from Seattle to Sedro Woolley. Between Sedro Woolley and Sumas there is no other line upon the right of way.

Q. As to the situation, say at Pilchuck, if complaint were made to the railroad company or a request to change a pole, could you do so?

A. Yes.

Q. Would you do so? A. Yes. [56—30]

[Testimony of J. J. Lynch, for the Petitioner.]

J. J. LYNCH, having been first duly sworn, testified on behalf of petitioner as follows:

My name is J. J. Lynch. I am superintendent of construction for the Pacific Division of the Postal Telegraph System, covering the Pacific Coast territory west of the Rocky Mountains, and including the line of the Postal Telegraph Company of Washington between Seattle and Sumas. I have had twenty-five years' experience in this line of business.

(Testimony of J. J. Lynch.)

I first had charge of the construction and repairs for the Postal Telegraph Company on the Chicago and Great Western in Kansas, and also had charge of the maintenance of the Postal Telegraph lines on the Mobile & Ohio between St. Louis and Cairo, Illinois.

I started with the Postal Telegraph Company as a lineman out of Kansas City in 1888. Afterwards I was road construction foreman. Then I went to Kansas City in charge of the lines there. I served in Kansas City, in charge of their lines in that district from 1891 to 1900. The line ran from Chicago to Kansas City by St. Joe and Des Moines. The telegraph lines were on the right of way of the railroad company. In some places there was only one telegraph line, and in others more. The rights of way were from twenty-five to one hundred feet—possibly two hundred in some places. In the course of my duties it was necessary to look after the maintenance of the line with reference to its relation to the right of way of the railroad and to the operation of the railroad, and in reference to any obstruction to the uses by the railroad of the right of way and the operation of its [57—31] trains. I was brought in relation to the railroad company and its operation as to all matters affecting the mutual relations arising from the situation of a telegraph line on the right of way of a railway company. On the Mobile & Ohio right of way there were three telegraph lines. I was on that line from 1902 to 1905 and never knew of any interference because of the presence of any one of the telegraph lines on the

(Testimony of J. J. Lynch.)

right of way. I never knew of any injury or damage occurring to the railroad company from the construction, maintenance or operation of any telegraph lines on the rights of way where I had supervision of the telegraph lines. After 1909 I was transferred to San Francisco as superintendent of construction, covering the Pacific division. We have telegraph lines on the Santa Fe, Southern Pacific and the Northern Pacific. The Western Union is also on the railroad rights of way. I have been familiar with the line running from Seattle to Sumas since the early part of 1910. I was over the line three or four times that year, and twice each year since. I made a trip over the line about two or three weeks ago. I am familiar with the petition in this case and the manner in which, as there described, the Postal Telegraph Company of Washington proposes to construct and maintain the proposed telegraph line on the right of way of the Northern Pacific Railway Company between Seattle and Sumas.

Q. (By Mr. HUGHES.) I will ask you to state to this jury, assuming that the telegraph line were constructed and maintained in the manner described in that petition and the stipulations that are also set forth in that petition, [58—32] to what extent, if at all, would it interfere with the operation of the railroad? You may state to the jury fully if there is any respect in which it would interfere with the operation of the railway or inconvenience it.

A. I don't think it would interfere with or damage the railroad in any way.

(Testimony of J. J. Lynch.)

Q. To what extent, if at all, would it diminish or lessen the value of the use of the right of way, or lessen the uses to which the railroad company could put this right of way for railroad purposes?

A. Under our petition I do not see that it would damage them in any way.

Cross-examination.

Q. (By Mr. WINDERS.) You have been over this line about three times in 1910?

A. I went over it three or four times in 1910.

Q. And twice in 1911? A. Yes, sir.

Q. And how many times this year?

A. Twice this year.

Q. How would you go over the line?

A. On the rear end of a passenger train.

(Witness excused.)

Mr. HUGHES.—I offer in evidence a certificate of the Postmaster General of the filing of the acceptance by the petitioner of the provisions of the Post Road Acts of Congress, to apply to this telegraph line.

(Document received in evidence and marked "Petitioner's Exhibit No. 1.")

(Thereupon defendant rested.) [59—33]

Testimony for Defense.

[Testimony of Locke M. Perkins, for the Defendant.]

LOCKE M. PERKINS, having been first duly sworn, testified on behalf of defendant as follows:

My name is L. M. Perkins. I am engineer of maintenance of way for the Northern Pacific, and

(Testimony of Locke M. Perkins.)

have been connected with the engineering department of the Northern Pacific about ten years. I cover the lines west of Paradise, Montana. My duties are connected with general engineering matters in connection with the maintenance, addition and construction in that territory, and general advisory capacity in connection with the operating department, on maintenance matters.

I am familiar with the line from Fremont to Sumas. I have had occasion to go over it frequently both on wrecking trains and special trains making inspection trips, on hand cars on portions of it, and practically the whole of it on small gasoline cars, and parts of it on foot. I am familiar with the condition of the right of way and have become familiar with the expense of maintaining that right of way. I am familiar with the petition which has been filed by the Postal Telegraph Company, and also with their present occupancy of the right of way.

Q. I wish you would state to the jury, Mr. Perkins, the added expense, if any, in the maintenance of that right of way from Fremont Station to Sumas, by reason of the presence of the Postal Telegraph Company's poles, as contemplated under this petition?

A. The added expense has not been made an exact matter of [60—34] record by bookkeeping, but I would estimate from my general knowledge of the line in question and of the nature of it, that the specific and general items that add to the cost of the

(Testimony of Locke M. Perkins.)

maintenance on that line by reason of the presence of a pole line would make an annual amount of about fifteen dollars per mile.

Q. Explain to the Court and jury how you arrive at that figure.

A. I am taking into consideration the added cost of clearing the right of way from brush; the added cost by reason of the particular items of clearing and pulling the brush and inflammable material away from poles, to protect them from destruction by fire; the added cost by reason of the presence of poles between and adjacent to tracks, in the way of acting as obstructions to the handling of ties and tie renewal; the added cost by reason of the protection and care that is needed in the burning of old ties, and needed in order to protect the poles from fire and to protect the wire lines from damage; the added cost by reason of delays that occur in connection with construction, in waiting for poles to be moved, and the actual loss of the use of a certain amount of team track capacity by reason of poles being located beside team tracks and thereby preventing the use of a certain part of the team track, which is worth a certain amount of money to us, and to some extent the added risk by reason of poles being in close proximity to tracks and endangering the employees and others in connection with the operation of trains. [61—35]

Q. What is the character of the country through which this line runs?

A. It has been in the past very heavily timbered,

(Testimony of Locke M. Perkins.)

and it still is to some extent. There is, on the greater part of the line between Fremont and Sumas, a heavy growth of underbrush which grows to a height of six or eight feet in a year. There are short stretches of it which have been cleared—that is, cleared in the sense that practically reduced it to tillable land—but the greater portion is still covered with underbrush.

In the neighborhood of mile post 64 from Seattle there is some work at what we call Pilchuck in the way of some little change of line and considerable change of grade. At other points we have on our books changes supposed to be in progress but is not at present for lack of men.

Q. What is understood by a standard finish on the right of way?

A. That is immediately around and below the ties, varying depths we place gravel, and there is a certain prescribed way for dressing off the top of that gravel in order to get what has been decided by proper officials of the road to be proper drainage and the best dressing for preserving the life of ties and the most economical in general track maintenance.

Q. Are you making the standard finish of the right of way on this new work of yours upon the line at Sumas?

A. Well, on the Pilchuck work, when we get to that stage, and we intend to on considerable other portion of the line on which we have authority to ballast. [62—36]

(Testimony of Locke M. Perkins.)

Q. What has been the effect upon this roadbed maintenance of its occupancy in maintaining and rebuilding and constructing telephone and telegraph poles along the line of road?

A. Why, the employees of such companies traveling along a track break down the standard finish, requiring the labor of finishing it up again; and this is particularly true where they reconstruct a portion of their line.

Cross-examination.

(By Mr. HUGHES.)

The WITNESS.—I have had control of the line from here to Sumas as engineer of maintenance for about sixteen months. We intend to clear the right of way once a year. The whole of the right of way has not been cleared each year in the past. There is a great difference in the expense of clearing and burning the brush on different parts of the right of way. Near the towns, where there is little brush, the cost of clearing is small. Aside from such places, there is no material difference. The cost of clearing the right of way per mile is approximately \$150. I have never attempted to determine the actual cost of doing a single mile of that work. The expense comes from the fact that men have to be employed to cut the brush and other growth. As a rule, we pile the brush. As a rule, under the forestry regulations we have to pile it in little piles and burn it. From Sedro Woolley to Sumas there is a pole line only on one side of the railroad track. When we cut the brush on the other side of the

(Testimony of Locke M. Perkins.)

right of way we pile and burn it just the same as where [63—37] the telegraph line is. We use brush scythes and brush hooks and forks.

It is a common practice for people to walk along our railroad tracks. The telegraph employees break down our banks more when they walk along.

The presence of telegraph poles around our depots and sidetracks would not be any damage or injury if we were entitled to have them removed and they were removed. [64—38]

[Testimony of F. M. Smith, for the Defendant.]

F. M. SMITH, having been first duly sworn, testified on behalf of the defendant as follows:

I am roadmaster of the Northern Pacific at Seattle. I have the territory from Tacoma north through Seattle to Machias, including several branches. I was assistant engineer of maintenance of way for three or four years previous to being roadmaster. I have been roadmaster in Seattle for the past three years. As roadmaster my duties included maintenance of the roadway, track and upkeep of the right of way. I have various section foremen and extra gang foremen under me. I have been over the road frequently and am familiar with the line as far as Machias, about mile post 42 out of Seattle. There is another roadmaster from Machias to Sumas. The right of way in my district is more or less wooded and brushy in character and was at one time heavily timbered but is now clear of timber. I am familiar with the location of the Postal Telegraph Company poles; and am also fa-

(Testimony of F. M. Smith.)

miliar with the petition presented in this proceeding. It is a part of my duty to keep track of the expense of maintenance of the part of the road of which I have charge.

Q. (By Mr. WINDERS.) I wish you would state to the jury, Mr. Smith, having in mind that the proposed use of this right of way under which this proceeding is being tried, the added expense to the company of taking care of its right of way by reason of the presence of the poles of the Postal Telegraph Company as proposed to be constructed under the petition, and considering all the stipulations contained there.

A. Well, it would increase the cost of maintenance in [65—39] several ways. Places where our right of way is narrow, it would doubtless increase the cost of burning the old ties; that is, moving them to a place where sufficient clearance could be obtained from the wires so that we could burn them without injuring the wires and also in unloading our ties or piling them up; and in places where the brush is rather heavy in the cutting of the brush, we would have to pile the brush back from the poles and from under the wires so that when the slashing was burned it would not destroy the poles and the wires, and we have at various times when we do this burning to station men along to watch the burning so that the poles would not catch and burn up. And this labor represents dollars and cents and probably would increase the cost of maintenance considerably. In some certain sections in this burning and

(Testimony of F. M. Smith.)

slashing probably it would increase the cost from twelve to fifteen dollars per mile, and in the handling of our ties for burning narrow strips of right of way such as we have from Fremont to Bothel it would run into considerable money in a year, depending on the number of ties we put in. It would increase the cost probably one or two cents a tie for the handling. I have figures showing about one cent for the extra handling on account of finding a proper place to burn them.

In construction work sometimes we construct tracks and notify the telephone and telegraph company to move their poles and they delay doing it promptly, and we have had to build our track in such a way as to get around their poles and sometimes hold our crew a day or two longer on the job until they move the poles out and [66—40] we can line our track up to the proper position. And all these items in the aggregate amount to considerable money in a year's time.

Q. Give the jury some figures on the expense of cleaning this right of way per mile and taking care of it; what it costs you per mile by actual experience.

A. That is variable, of course, with the width of the right of way and the character of the growth on the right of way. I find that it costs me from eighty to one hundred fifty dollars a mile, according to the width of the right of way and the character of the material to be removed.

(Testimony of F. M. Smith.)

Cross-examination.

We usually clear our right of way in the fall and winter months after the rainy season starts. Brush in this country will grow from six to ten feet a year and on sidehill cuts where your line is in places three or four feet growth will reach your wires, and you cut the brush before the rainy season starts because when the brush is wet it will short circuit your wires. After the rain sets in and track work is made rather useless on account of the wet weather, we cut the brush and clear the right of way; our section-men clear the right of way. We do the clearing in the winter season. We have about the same number of section-men in the winter as in the summer. If we did not have the clearing to do the force would be reduced.

(Witness excused.) [67—41]

[Testimony of W. E. Bender, for the Defendant.]

W. E. BENDER, having been first duly sworn, testified on behalf of the defendant as follows:

I am section foreman at Deeming, mile post 110. That is about fifteen miles this side of Sumas. I have been engaged in track work about ten years, and seven years on this section. The extent of my section is ten miles. I am familiar with the expense of taking care of the right of way along the vicinity of Deeming. It was originally heavily timbered. We have a pretty heavy growth of brush on this section. Some miles have more than others. We have most all small brush, but mostly willows. It grows from six to ten feet a year on an average.

(Testimony of W. E. Bender.)

We have cleared parts of the section each year. It is our intention to clear the right of way yearly as much as we can.

Q. (Mr. WINDERS.) Have you made any computations, Mr. Bender, since this case has been called to your attention, and arrived at an estimate, based upon your experience and the time it takes and other matters with reference to the occupancy by this pole line—can you give the approximate additional expense, Mr. Bender?

A. I can give an estimate.

Q. I wish you would state that to the jury.

(Mr. Hughes objected to the question.)

Q. (By Mr. WINDERS.) Do you know about what the increased cost is?

A. Yes, sir, I know something about it.

Mr. WINDERS.—I ask that he be permitted to state about what the increased cost would be.

Mr. HUGHES.—In view of the varied testimony of the witness, it seems to me that it does not rise to the dignity of competent opinion, expert in its character. [68—42]

The COURT.—You may cross-examine him to show what it is based on. I will let him answer the question.

A. I would state about five per cent of the original cost of the clearing and work. I always do my work together—that is, I cut the brush and throw it away and as I burn it I keep it cleared away from the poles. In cutting brush we must keep it pulled away and carried away from the poles. Some

(Testimony of W. E. Bender.)

places we must carry it some distance and other places just away from the poles, and then in burning it we must keep the fire away from the poles, and where the poles get on fire I always take men back there and put out the fires over the right of way, where we burn the brush, and I would estimate about five per cent of our work would be in the care of the poles and removing the brush.

Q. About what is the expense per mile for clearing upon your section?

A. Where I noted the cost of clearing it is about one hundred and fifteen dollars per mile.

Cross-examination.

Q. (By Mr. HUGHES.) The brush grows very thick in your section?

A. Parts of it, yes. It was about three years ago that I kept track of the cost of clearing one mile. I wanted to see what it cost and I commenced at the mile post and worked steady at that and just kept track of it to see what it cost. Don't know how many days it took or how many men I had working. I think I worked five men.

Q. You do not remember what it cost exactly?

A. I said something like one hundred fifteen dollars. [69—43]

The right of way was one hundred feet wide. The railroad track was in the center. I don't know how much time it took on each side of the right of way; didn't keep it separate. There was about the same amount of brush on one side as the other. We worked part of the men on one side and part on the

(Testimony of W. E. Bender.)

other. I don't know whether it took the same length of time on one side as the other. We had to pile up the brush on both sides. The right of way is fenced, and we had to carry the brush back to keep it from burning the fences down. In some places we did not have to move it. We had to pile it up to burn it. I know that under the law we have to keep men watching our fires to see that they are guarded from spreading to the adjacent ground. We always watch our fires on both sides of the track. We do not clear all the brush on the right of way every year.

(Witness excused.)

[Testimony of W. H. Gale, for the Defendant.]

W. H. GALE, having been first duly sworn, testified on behalf of defendant as follows:

I am in the employ of the Northern Pacific Railway Company as roadmaster; a little over eleven years. I have been engaged in railroading and track work thirty-five years. I have charge of the line from Machias north to Sumas. I have been in charge over eleven years. My duties are general repairing and looking after new work and improvements. I have charge of the section-men and extra gang, having to do with the maintenance of the track and the right of way. They report to me. I am familiar with the expense of maintaining the right [70—44] of way of the defendant from Machias to Sumas. If the right of way was cleared each year it would cost in the neighborhood of one hundred to one hundred fifty dollars per mile. We

(Testimony of W. H. Gale.)

clear so much every year. The average cost on my division would be one hundred dollars per mile annually; we cannot do it for less. I have read the petition in this proceeding and am familiar with the stipulations contained in it.

Q. (By Mr. WINDERS.) I will ask you if you can state to the jury what, if any, added expense there would be annually in clearing and caring for this right of way by reason of the construction, reconstruction and maintenance of a line of poles as proposed in this petition. You may state to the jury the amount per year.

Mr. HUGHES.—I object, for the reason that the witness has not shown himself competent, and because it is speculative and remote and inappreciable.

(Objection overruled.)

A. Well, we have right of way on a part of our track that we have no poles on, and if we go once a year and cut that brush we can cut it irrespective of where it falls. We can let it fall anywhere except next to the fences. When the men are cutting brush they let it fall away from the fence. We do not make any pretense of piling the brush to burn it because it dries out better, and after we come to burn it we can get a better burn because it burns every weed on that right of way. It is our desire always when we burn it—it not only helps to burn the brush but it sets it back by burning the roots, and where you have a line of poles you have to protect those poles by cutting around the poles and

(Testimony of W. H. Gale.)

throwing the stuff back a sufficient distance to save the poles. We have [71—45] always done it. That has been the practice, and it is quite an item when you come to clear a right of way to clear away and keep it away and save the poles while you are burning it.

Q. About how much a mile, Mr. Gale?

(Same objection.)

A. I would say at least ten or twelve dollars per mile, easily, for the difference in pulling away the brush. There have been a great many of the telegraph company's poles on fire at one time or another. The matter of extinguishing the fires requires labor. I never knew the telegraph company to furnish men to watch the poles or pull back the brush when they are burning, or to clear any of the right of way except to chop down a few of the tops which might be reaching up to the lower wires. We have to cut it off again just the same and it takes more work to do it.

Cross-examination.

Q. (By Mr. HUGHES.) Mr. Gale, what portion of your road runs through cuts?

A. Well, probably one-third of the distance.

Q. What portion of it would be fills—a quarter?

A. Well, yes, take the side fills.

Q. I am talking about the fills where your road-bed is above the level?

A. That is easily a quarter, or more.

Q. Have you cleared all the right of way this last year?

(Testimony of W. H. Gale.)

A. No, sir, but we cut considerable; possibly about one-third.

Q. What portion of it did you clear last year?

A. About the same, I should judge. [72—46]

Q. When do you burn the brush?

A. Prepare to burn it along in May. A good deal of it is burned by the engines setting fire to it. We burn it all over if we can get the time to burn it. The more we burn it the more it kills the brush on it. We cut it mostly in the winter time.

Q. You spoke of poles being burned; that most of the poles have been burned some time or other.

A. They have been on fire; burned around. You can get brush and pile it up, but the heat is going to catch the pole if you allow it within seven or eight feet. You have to carry the brush away from the poles a reasonable distance. Whenever a fire starts on the right of way our section-men are supposed to go there. A good many poles have burned down; that is when the men were not there. Grass will start a pole on fire, and if a fire starts when the section-men are not there, you cannot help it. That is when the fire catches from the engine or some other cause. If we burn the brush we take care of the poles.

Q. Now, Mr. Gale, I want you to tell this jury whether you ever took note of a single mile, as to the time that it took you to clear one side where the right of way did not have a telegraph line, and the time it took you to clear the other side where it did.

A. No, sir, not particularly, I did not. Anyone

(Testimony of W. H. Gale.)

knows that a pole line is a hindrance to men going along where they have to cut and pull back brush. If there were any poles on the other side I would have to pull the brush.

Redirect Examination. [73—47]

Q. (By Mr. WINDERS.) State to the jury what difficulties you encounter in burning old ties by reason of the presence of this telegraph line.

A. Well, I can't say that on our line it would be any great amount up there. There is only one line and they are pretty well up from the ground. It is not like where the line is loaded down with wire close to the ground. Of course, we make it a rule not to pile any around or close to the poles so as to endanger the pole or put too big a pile under a string of wires. There is lots of times there is twelve feet from the track generally to where we pile our ties, and we make it a rule to put them over on the other side; that is, unless the wires are sufficiently high to be out of danger.

Recross-examination.

Q. (By Mr. HUGHES.) What do you do with the ties through those cuts when you remove them to burn them?

A. You take them out to the end of the cut; sometimes we pile them up in it, a few ties at the time, and burn them right in the cut, but you can only burn a few at the time.

Q. How wide are your cuts?

A. Twenty feet, and sometimes more.

Q. How wide is the roadbed?

(Testimony of W. H. Gale.)

A. As a rule, about eighteen feet on the fill and lots of places twenty.

Q. How many do you usually put in a pile when you burn?

A. Sometimes, burning in the cuts you can't put over ten or fifteen ties. Outside we sometimes, where we have the place, pile up thirty or forty or fifty—where you [74—48] push-car them up.

Q. Tell us about the added expense.

A. Where did I say that it costs us any more to handle the ties on account of the poles?

Mr. WINDERS.—You say there is only one pole line there.

A. That is what I said, and I do not say that it costs any more on that account on my district.

[Testimony of R. J. Rhodes, for the Defendant.]

R. J. RHODES, having been first duly sworn, testified on behalf of the defendant as follows:

I am section foreman at Arlington; have been section foreman for seven years. Have been familiar with track work over thirty years. I commenced work for this company in 1890. My section is seven and a half miles long. I am working under Mr. Gale as roadmaster.

Q. (By Mr. WINDERS.) Are you familiar with the location of poles as proposed to be constructed by the Postal Telegraph Company in this case?

A. I am.

Q. Can you advise this jury, taking it upon your own section, what the additional expense per year would be in the caring for that right of way by rea-

(Testimony of R. J. Rhodes.)

son of the construction of those poles as proposed and their maintenance by the Postal Telegraph Company?

A. Well, if my experience would teach me, it would be from eight to twelve dollars per mile.

Cross-examination.

Q. (By Mr. HUGHES.) You were section foreman under Mr. [75—49] Middaugh, who testified here?

A. I was; yes, sir. It costs more now to clear a right of way than it did when he was roadmaster. The price of labor is much greater, and as the material becomes accumulated on the right of way by growth from year to year it becomes much harder to clear it.

Q. Do you mean to say, if you clear it properly each year that it does not become less and less difficult to clear? A. It is never cleared properly.

[Testimony of Herman Ridell, for the Defendant.]

HERMAN RIDELL, having been first duly sworn, testified on behalf of the defendant as follows:

Q. (By Mr. WINDERS.) You are in the employ of the defendant?

A. I am section foreman at Hartford. I have been section foreman for the defendant seven years. My section is between Hartford and Darrington. I have been familiar with the track and right of way work nineteen years; and worked on the line between Fremont and Sumas about six years. The right of way over my section is very brushy.

(Testimony of Herman Ridell.)

Q. You are familiar, Mr. Ridell, with the petition in this case; that is, the rights that the Postal Telegraph Company are attempting to acquire to a pole line along this line, and a line anywhere from the outer edge of the right of way to twenty-five feet of the track? A. Yes.

Q. Are you able from your experience to testify to this [76—50] jury the added expense per mile per year of the annual maintenance of this right of way by reason of the proposed construction, reconstruction and maintenance of that telegraph line? A. Yes.

Q. You may look at the jury and state to them what, in your opinion, is the added expense per mile.

A. I figured an extra expense of eight dollars per mile. I would take it for all the expenses in all cases, such as throwing away brush, piling ties, unloading cars and such like. In cutting brush on the right of way with the telegraph line there we are subject to hitting those poles with the scythe or the brush-hook, and throwing the brush away from the poles, say from four to six feet. Then we come along in a month or two or three months after and burn it, and then we have to protect those poles from burning from the flames of the fire, as those poles have a light hair on the bottom, and the flames being so high that it touches those poles and it blackens it, and then we are compelled to outen those poles now and then.

Q. How about your working in the yards?

A. There is places in the yards where we have to

(Testimony of Herman Ridell.)

shovel cinders from the main track or side track where those poles are close; for instance, like Hartford, the poles are six feet from the rails. We must throw those cinders out over two or three tracks, which sometimes interferes with the pole. Those cinders are warm or hot, and they are liable to burn the pole and therefore we have to carry those cinders three or four or five feet farther. This is also added to the extra expense. [77—51]

Q. (By Mr. WINDERS.) Have you had other experiences where the poles would reach the track?

A. Yes.

Cross-examination.

Q. (By Mr. HUGHES.) How many men are there under you?

A. From three to eight. Certain times of the year when the traffic is light we are allowed three men and when traffic is heavy or bad weather or such like, we are allowed more; generally in the fall and spring, on account of bad weather and cutting brush.

Q. What time do you cut the brush?

A. One year I cut the brush commencing the last part of June, and July and August. That was in 1909. I cut three miles, from mile post 45 to mile post 48.

Q. What time of the year did you cut it in 1910?

A. About the same time. We didn't cut all of the right of way but we did cut here and there a patch; and I cut the three miles over again which I cut in 1909.

Q. What time did you cut in 1911?

(Testimony of Herman Ridell.)

A. In July and August and part of September. We cut about four miles—in patches. We did not have time to cut it all, but we took the worst of it.

Q. In the year 1912 what proportion of your right of way had you cleared?

A. I cut the brush from one end to the other twenty feet from the outside rail on both sides of the track. I did that during June, July and August. In April and May, 1910, I burned three miles that I slashed in 1909. I didn't burn much in 1911—only here and there. We haven't burned any of what was cut last year or this [78—52] year; cannot burn it before next April or May.

Q. Do you have as many men in the winter time as you have in the fall?

A. No. I have about the same number in the spring as in the fall. I have the most men in the fall and spring.

Q. One of the large items of expense here is shovelling cinders, I believe; is that right?

A. Yes. We generally shovel cinders while they are hot. We have to get them away from the track or they would burn the ties out, so we put them where they will not cause fire elsewhere; generally dump it right opposite one of those telegraph poles. If they were put somewhere else we would not have that trouble.

[Testimony of John Walsh, for the Defendant.]

JOHN WALSH, having been first duly sworn, testified on behalf of the defendant as follows:

Q. (By Mr. WINDERS.) You are in the employ

(Testimony of John Walsh.)

of the Northern Pacific Railway Company?

A. Yes. I am section foreman; located at Snohomish; have been in the employ of the company twenty-six or twenty-seven years; worked on the section at Snohomish about ten years. Have heard this petition read and know what the telegraph company is endeavoring to acquire in this proceeding. I have had charge of the work done in my section; the work of maintaining the track and clearing and caring for the right of way. Am familiar with the proposed location of these poles.

Q. Are you able to give this jury the additional cost, if any, in caring for your right of way annually by reason of the presence of the poles of this company as proposed [79—53] to be constructed and under the stipulations as contained in this petition?

A. Yes.

Q. Will you give the jury your opinion on that matter?

A. I think the cost would be about in the neighborhood of twelve or thirteen dollars annually per mile in maintaining the right of way, owing to the present condition; owing to the Postal service in maintaining their right where they cross our right of way.

Cross-examination.

Q. (By Mr. HUGHES.) How many men do you have under you?

A. Usually from six to eight. My section runs both ways from Snohomish. Part of it is open country, without much timber on either side and

(Testimony of John Walsh.)

free from brush—but not all of it.

Q. I asked you when, how and where you figured out the amount of extras and extra cost it would be, what the items would be which would aggregate so much money?

A. Because my experience daily in my work tells me the cost in maintaining those on the right of way of the present line; and they should have their equal share in maintaining that line, and why should we be accountable for it?

Q. When did you attempt to compute the items of the extra expense and what would make the expense greater? Did you figure that out at all before you came here? A. No, sir.

Q. Before you went on the witness-stand?

A. No, sir; I don't know that I have.

Q. So that you did not give this matter much consideration? [80—54]

A. I haven't considered it at all. I have just listened to the proceeding.

[Testimony of E. E. Dildine, for the Defendant.]

E. E. DILDINE, having been first duly sworn, testified on behalf of the defendant as follows:

Q. (By Mr. WINDERS.) What is your employment?

A. Assistant superintendent of telegraph for the Northern Pacific Railway Company; have been connected with the telegraphic department for twenty-six years; about thirteen years as railway and commercial telegraph operator, and thirteen years as assistant superintendent of telegraph. As assist-

(Testimony of E. E. Dildine.)

ant superintendent my headquarters were at Tacoma for about two years and since then at St. Paul. I am familiar with the various telegraph and telephone and other wire lines along the Northern Pacific system; and am familiar with the petition in this case and the rights they are seeking to acquire.

(Certain questions were propounded to this witness and objections sustained by the Court.)

Q. What elements, what things cause, or what facts will cause interference or damage or injury to the operation of the road and the use to the railroad company?

A. The falling of trees and the inconvenience of the poles in that location. I do not see anything additional to that. [81—55]

[Testimony of Joseph Smith, for the Defendant.]

JOSEPH SMITH, having been first duly sworn, testified on behalf of the defendant as follows:

Q. (By Mr. WINDERS.) What is your business?

A. Right of way agent for the Northern Pacific Railway Company. I am familiar with the value of the right of way along this Seattle-Sumas line. I made investigation as to the values along the right of way; am familiar with the amount of taxes we pay per year per mile.

(Questions were then propounded to the witness concerning the value of the right of way and the valuation by the State Tax Commission and the taxes paid by the railroad company; to which objections were sustained by the Court.) [82—56]

. [Testimony of J. E. Craver, for the Defendant.]

J. E. CRAVER, having been first duly sworn, testified on behalf of defendant as follows:

Q. (By Mr. WINDERS.) Mr. Craver, what position, if any, do you occupy with the Northern Pacific Railway Company?

A. Superintendent of the Seattle Division. The Seattle Division includes the right of way covered by the petition, running from Fremont to Sumas. I have been engaged in the railroad service 31 years, 26 years with the Northern Pacific. I was telegraph operator for about 8 years; chief train dispatcher a little over 6 years; trainmaster about 3 years and 8 months, and superintendent over five and a half years; have been superintendent of the Seattle Division two years. I am familiar with the right of way and track running from Seattle or Fremont to Sumas. The rights involved cover only between 120 and 121 miles.

As superintendent, it is necessary for me to look after the running of the trains and the maintenance of track and buildings. The roadmasters work under my directions. There are two on this line.

I presume in the last two years I have been over the line between here and Wickersham perhaps fifty times; between Wickersham and Sumas I have not been over it so often. I have been over it on regular and special trains, and on the gas car.

Q. I wish you would give to the jury the average cost per mile of caring for the right of way per year, in the way of keeping it clear and free of combustible material.

(Testimony of J. E. Craver.)

A. It would run from eighty to one hundred fifteen dollars a mile per annum. Now, I am speaking of a right of way [83—57] one hundred feet wide, which contains 12.12 acres. Of course where the right of way is less than that the cost would be proportionately less, but a considerable portion of this right of way is one hundred feet wide. We had thought it might be advisable to clear all of this right of way, provided we could get anyone to put in figures on it. The figures that I have quoted here were compiled so that it would place us in a position to pass on possible bids for this work. The figures I have given are the actual cost, as checked by our men mile after mile.

Q. Are you familiar with the proposed location of the Postal Telegraph Company's poles and the stipulations under which they desire to occupy our right of way?

A. No, I cannot say that I am familiar with the proposed location. I read the petition.

Q. It is pretty difficult for you to know where they are going to place them?

A. Yes; I don't know.

Q. Well, take it that they have got the right to put them between those points anywhere on this right of way from a point on the edge of it to twenty-five feet of the track, and they say they are going to maintain them as well as they have in the past; are you in a position to give this jury an opinion of the additional cost of clearing that right of way by reason of the presence of those poles to be con-

(Testimony of J. E. Craver.)

structed as proposed in their petition, the additional cost to be the annual additional cost? I mean what is the additional cost now and is there any additional cost in doing this clearing by reason of those poles being on the right of way? [84—58]

A. I should say from ten to twelve dollars. I am familiar with the location of their poles at Sumas and at the town of Snohomish, and the location of their poles generally along our right of way between the various switch tracks and main line tracks.

Q. What effect, if any, upon the operation of this system does the presence of those poles have upon the right of way?

A. It decreases the use of our track, when they are not placed a sufficient—this refers to team tracks—it decreases the use of our track when the poles are not placed a sufficient distance from the track to permit of the passage of teams.

Q. I will ask you this question, Mr. Craver: If the range of territory over which this company under this decree are required to place their poles, upon the outer edge of the right of way or five feet from the outer edge of the right of way, and their cross-arms sticking over to the right of way edge to a point within 25 feet with their poles and 20 feet with their cross-arms, would impose a greater burden on the right of way than if there was a straight line of poles.

MR. HUGHES.—I object to that question as incompetent and immaterial.

(Argument.)

(Testimony of J. E. Craver.)

The COURT.—I think he may answer that question.

A. The pole line, in my opinion, should be placed upon the edge of the right of way; that is, within five feet from the edge of the right of way. It would be very much [85—59] better if it could be in a straight line and there should be as little crossing of the tracks as possible.

Q. The evidence has shown in this case the presence of telegraph lines as they exist along this line and also the question of the burning of old ties in addition to the burning of the right of way and the clearing of the right of way. I wish you would state to this jury, as an experienced railroad man and one familiar with the maintenance and upkeep of a right of way, whether or not in taking care of the old ties that are taken out necessarily in the renewal and reconstruction of this railroad line, any additional expense is imposed upon the company in burning or otherwise disposing of them, by reason of the construction and maintenance of the line as proposed in this petition by the petitioner.

A. There is some additional expense in burning old ties taken out of the track, by reason of having to place them at a point where they will not endanger the poles or the wires. They very often have to be carried a greater distance on this account, and, of course, the carrying of material of any kind costs money.

Q. Mr. Craver, I wish you would state to the jury from your experience as an operating man what, if

(Testimony of J. E. Craver.)

any, added expense or incumbrance or embarrassment there is under which this line would be operated by reason of the danger of the falling of poles and the like—poles to be constructed as provided under this petition.

Mr. HUGHES.—I object to that as incompetent, irrelevant and immaterial and because it is too remote and contingent and uncertain. [86—60]

(Objection overruled. Exception noted.)

A. Yes, sir, I have known of a number of cases. The particular case I am going to talk about, I was there. Something like a year ago the roadmaster, Gale, and I were just above McMurray; there was a forest fire which had come in off the hill and had burned down a number of telephone poles which we found lying across the track with the wires badly tangled. We arranged to afford protection to our trains and sent after the section-man, and Mr. Gale and I stayed there and tried to connect some of the wires together, and, of course, had the poles removed from the track. The reason those poles fell on the track was because they were placed so close that they did not clear it when they fell.

Q. Mr. Craver, describe the conditions along this right of way between Fremont Station and the city limits, and what the conditions will be when this right of way is occupied as proposed by the petitioner in this petition, and the effect it will have upon the use thereof by the railroad company for railroad purposes.

A. We have fifty feet of right of way from Evans-

(Testimony of J. E. Craver.)

ton Street to the University grounds—from Fremont Station to the University grounds—I do not know what we have in the University grounds, and I guess no one else does. This right of way is used by a great many industries. There are quite a number of tracks leading off from the main line, to which we switch cars for business concerns; and the pole line now, in my opinion, crowds this right of way to a great extent in this particular territory and [87—61] that imposes a hardship on the railway company. To reduce this damage to dollars and cents would, perhaps, be impossible, but the fact does remain that in this particular district that the pole line inconveniences us on account of the lack of room.

Cross-examination.

Q. (By Mr. HUGHES.) Mr. Craver, you testified that with the telegraph line on there there will be some additional expense in keeping that cleared.

A. I did.

Q. Will you tell the jury what causes that additional expense?

A. In clearing the right of way it is necessarily harder to cut around the poles, and, whether we have been obligated to do it or not, we have seen to it that the telegraph poles and the telegraph lines were kept as free from damage as possible.

When I say it is harder to cut around the poles I mean that you must drag the brush away from the poles and out from under the wires where they are low, so that you will not burn the poles or burn the

(Testimony of J. E. Craver.)

wires off. The wires are usually high enough, but not always.

Q. If they are 20 or 25 feet high there is no trouble?

A. Not on this line they are not that high.

Q. Under this proposed condemnation?

A. They should be, but they are not.

Q. I am talking about this proceeding.

A. Yes. [88—62]

Q. Do you know from personal experience whether it would take any more time to go over a given space of ground with the telegraph poles in there every 165 feet than if they were not there?

A. No, sir; I never used a brush-hook.

Q. Now, you spoke about the expense of pulling out the brush and piling it—do you know what they do in that particular?

A. I know they do not pull it away and pile it to any great extent except to get it from the telegraph poles. They do not pile it in piles under ordinary conditions because it is not necessary.

Q. If the law requires you after you clear and cut your brush to pile it and burn it, then this piling does not cut much ice, does it?

A. Only as regards getting it away from the fences and the telegraph wires and the poles.

Q. When you pile brush you have got to get it away from where it was before to make a pile of it?

A. Yes.

Q. You spoke of poles at Sumas and Snohomish being an interference and an inconvenience to

(Testimony of J. E. Craver.)

wagons; to what wagons?

A. I mean the wagons of customers going to the team track to get freight to be loaded in their cars. It is an inconvenience to us in transacting business. We do not spot a car with the door in front of a pole.

Q. If under this new condemnation there is no connection with your depot stations and these poles are in your way and are removed out of it and farther off your right [89—63] of way, then that objection would not exist.

A. No, not if you put them where they are absolutely out of the way, if that is possible.

Q. And it would not be necessary to have them run into your stations if they do not connect with your station and furnish a wire for your station, would it? A. No, it would not be necessary.

Q. You spoke of burning ties. I will ask you first how often you have to renew ties.

A. The tie renewal in that piece of track is 18 per cent per annum; in other words, the ties are renewed entirely about once every six years. We lay about twenty-six or twenty-seven hundred ties to the mile, two-foot centers. The ties are seven by eight inches and eight feet long. We are renewing ties constantly along each section of the line along the right of way or track in the section. Tie renewals are ordinarily handled during the summer. An average renewal of ties is three or four to the rail. The rails are thirty feet long and there are sixteen or seventeen ties to a rail.

Q. You testified about the instance when there

(Testimony of J. E. Craver.)

was a forest fire and some telegraph poles came down across your track—where was that?

A. Just north of McMurray; it caught from the underbrush. One or two of these poles at least were up on the hill side; at least four of them reached the track. It might have been that they were Western Union poles.

Q. You have never had an accident in consequence of the falling of a telegraph pole.

A. Nothing only the slight one which you have not let me [90—64] testify about.

Q. That was the only instance in your thirty years' experience that you know ever occurring to cause any damage or injury to the railroad company? A. No, sir; I would not say that.

Q. Within your experience and knowledge it is the only one you know of?

A. No, it is not the only one. I have known of a number of them.

Q. Where any damage was caused?

A. Engines running into the poles. Of course, I do not remember any serious accident caused. There was one other time on the Bellingham branch—I do not know who the pole belongs to. I am saying that it is dangerous when you permit poles to be near enough to a track so that falling poles will strike the main line—there is that additional hazard.

Q. You spoke of the conditions between Fremont and the city limits—you also have the Western Union line on your right of way? A. Yes, sir.

(Testimony of J. E. Craver.)

Redirect Examination.

Q. (By Mr. WINDERS.) Mr. Craver, I wish you would state to the jury, in doing that work that is being done around the Pilchuck where you are cutting out the grades and making a new fill, whether or not in doing that work, irrespective of the fact of obligations similar to those contained in this petition, if there is any added expense in making your fills around those poles or making your [91—65] cuts under the poles.

Mr. HUGHES.—I object to that as irrelevant, immaterial and incompetent.

(Objection overruled. Exception noted for plaintiff.)

A. I instructed them to use every care in protecting the poles, and necessarily it cost us some additional money to do this. This material we are taking out is filled with rocks, and we have to watch it or it would knock the poles down when the plow plows off the material.

Q. I will ask you further, as superintendent of this division, the character and amount of work that is going to be done on this Sumas line, and that is now authorized to be done and the amount of money that will be expended.

Mr. HUGHES.—I object to that as contingent and remote.

The COURT.—I will permit him to answer the question, and you may cross-examine him as to the effect under the stipulation.

A. In doing this work between Wickersham and

(Testimony of J. E. Craver.)

Sumas, there is no question but what it will be necessary to move a large number of poles to enable us to do the work. If this work is done promptly by the Telegraph Company before we get ready to start operations. I cannot say that it will cost any more money to do the work. If there is any delay in moving the poles, the work will necessarily be more expensive on account of the delays.

Q. Mr. Craver, I would like to ask this question: This work that is being done will be carried out there—will that affect this right of way—making the fills and cuts outside of a point 25 feet from the track? A. Yes; in some instances. [92—66]

Cross-examination.

Q. (By Mr. HUGHES.) How wide is your right of way along there? A. 100 feet.

Q. And your track is how wide?

A. About 14 feet actually occupied by the track and the grade slopes to the ties.—The track itself is four foot eight and a half inches—that is, between the rails.

(Witness excused.)

Mr. WINDERS.—I again offer in evidence exhibit “C” for identification, being the contract under which this line has been occupied from 1888 to the present time.

Mr. HUGHES.—We renew our objection.

(Objection sustained.)

Here the defendant rests. [93—67]

Rebuttal Evidence.

[Testimony of E. Colburn, for the Petitioner (in Rebuttal).]

E. COLBURN, having been first duly sworn, testified on behalf of the petitioner as follows:

Q. (By Mr. HUGHES.) What is your business, Mr. Colburn?

A. Civil Engineer. From 1871 to 1880 I was locating engineer for railroad construction; came to this State in 1899, and I have lived in Snohomish and practiced my profession there since that time. I have been city engineer of Snohomish and Monroe; have surveyed logging roads in this State. I surveyed a water line for the city of Snohomish over sixteen miles of defendant's right of way.

Q. What is its condition between Fremont and Sumas as to the growth of weeds, grass and brush? I mean as to the character of the land. I am not attempting at this point to go into its present condition, as a matter of fact, but its condition as to its susceptibility of growing weeds and grass and brush, and the character of the land in that respect.

Mr. WINDERS.—I object to it on the ground that it is not rebuttal.

The COURT.—I will sustain the objection.

Q. (By Mr. HUGHES.) Are you familiar in your experience as an engineer, both on and off this right of way survey and otherwise, with the matter of cutting brush on such ground as this right of way, brush and weeds or bracken, or whatever grows on such right of way? A. Yes.

(Testimony of E. Colburn.)

Q. I will ask you to state what, if any, would be the [94—68] labor or trouble in clearing the right of way of brush and other undergrowth that grows in a season or two, with telegraph poles strung at intervals along on the right of way than without them?

Mr. WINDERS.—I object to that on the ground that it is not rebuttal, and on the further ground that he has not shown himself qualified to answer the question.

(After argument of counsel.)

The COURT.—I think the questions which you are propounding, if not gone into in the first instance, were part of your case in the first instance and I do not think it is proper rebuttal. The objection is sustained.

Mr. HUGHES.—I take an exception.

The COURT.— The exception is allowed.

Q. (By Mr. HUGHES.) Would it take any more time to cut the brush on the right of way where there were telegraph poles than where there were no telegraph poles?

(Same objection; same ruling and exception.)

Q. Are there any irregularities upon the surface, barrow-pits and other irregularities on this surface where those weeds and brush grow?

(Same objection; same ruling and exception.)

Q. Are there logs and stumps on this right of way?

(Same objection; same ruling and exception.)

Q. In cutting brush on such a right of way, is

(Testimony of E. Colburn.)

more labor required to cut with the ordinary instruments that are used for that purpose where the poles stand than there would be to cut the growth which would appear at that place, that area, if the poles were not there?

(Same objection; same ruling and exception.)

Mr. HUGHES.—I am asking these questions for the purpose of my [95—69] record. I desire to say that I have several witnesses by whom I expect to prove the matters that I would expect to prove from this witness by an answer to these questions, and that I will not place them upon the witness-stand, assuming that the ruling of the Court would be the same as to this witness.

(Witness excused.)

[Testimony of J. J. Lynch, for the Petitioner (in Rebuttal).]

J. J. LYNCH, having been first duly sworn, testified on behalf of the petitioner in rebuttal as follows:

Q. (By Mr. HUGHES.) Were you on the witness-stand before? A. Yes, sir.

Q. Have you made an examination for the purpose and can you now testify as to the width of the right of way, that is, how many miles of it and what portion of it is one hundred feet and what portion fifty and what portion twenty-five?

A. Yes, sir, I have made examinations.

Q. I wish you would now state how many miles—what portions of the right of way are one hundred feet and what portions are fifty and what portions

(Testimony of J. J. Lynch.)
are twenty-five feet wide.

A. Well, I have a copy; after looking at it I can state accurately.

Q. All right; do so.

Q. (By Mr. WINDERS.) Where did you get your data? A. From blue-prints.

Q. Whose blue-prints?

A. Furnished by the Northern Pacific Railway Company to the [96—70] State office.

Mr. WINDERS.—I will object to the testimony.

Mr. HUGHES.—On the theory that the blue-prints which you furnished would not be correct?

Mr. WINDERS.—I object on the ground that it is irrelevant, immaterial and incompetent, and on the ground that it is not proper rebuttal.

Mr. HUGHES.—It was not material in the main case to prove the width of the right of way. Their testimony in the defense has been of such a character that I think it would be of aid to the jury in this case to know what are the widths of the right of way, and it is for that reason that we offer it now in rebuttal, inasmuch as they did not offer it.

Mr. WINDERS.—That was testified to by Mr. Perkins.

Mr. HUGHES.—He only gave approximations and this is specific testimony.

Mr. WINDERS.—I will say to Mr. Hughes that I want an opportunity to check up the record and if it is not in the record all I want is the right width. I do not think it is in the record, but there should

(Testimony of J. J. Lynch.)

be no difficulty in regard to the width of the right of way.

Mr. HUGHES.—These figures have been taken from the blue-prints filed with the Public Service Commission by you.

(Whereupon counsel for defendant and counsel for the plaintiff compare notes as to the figures produced by the witness.)

Mr. WINDERS.—I will insist on my objection, if your Honor please.

(Objection sustained. Exception noted for plaintiff.)

Q. Have you had any experience in cutting brush on the [97—71] right of way of a railway?

A. Yes, sir.

Q. For how many years?

A. I have had actual experience myself, either as a lineman or foreman for seven or eight years, or something like that.

Q. Does the cutting of brush on a given area cause more labor where telegraph poles stand than where they do not?

(Objected to as not rebuttal. Objection sustained. Exception noted for plaintiff.)

Q. Would it take more time?

(Same objection. Same ruling and exception.)

(Whereupon both sides rest and the testimony is closed.)

Thereupon the petitioner and the defendant each filed with the clerk of the court their respective

requests in writing for instructions.

After argument of counsel to the jury, the Court gave the following written instructions to the jury:

[Instructions.]

The COURT.—Gentlemen of the jury: In this cause it was admitted by the defendant that the allegations contained in the first and second paragraphs of the petition are true, and all of the allegations in the third paragraph of the petition, except the portion alleging that the right of way is fifty feet in width on each side of the line of the railroad throughout its entire length, and there was no necessity for introducing any testimony [98—72] in support of those allegations.

You are hereby instructed that in this proceeding the petitioner, Postal Telegraph-Cable Company of Washington, seeks to condemn an easement or privilege along, upon and over the right of way of the defendant, Northern Pacific Railway Company, for the construction or re-construction and for the maintenance and operation of its telegraph line from the intersection of Evanston street near Fremont station, in the city of Seattle, through the counties of King, Snohomish, Skagit and Whatcom, to the international boundary line at the north end of the depot building of the said railway company in the town of Sumas; its poles to be erected as near the outer edge of said right of way as circumstances will permit, and in such position as not to interfere with the operation or safety of trains or with the use of the right of way by said railway company, or its lessees, for its or their own purposes; that the said

petitioner proposes in this proceeding to condemn only so much of said right of way between the points and through the counties aforesaid as may be necessary for its uses for the purpose of constructing or re-constructing, maintaining and operating its telegraph line along, upon, over and across said right of way; said telegraph line to consist of a single line of poles not less than twenty feet, nor more than thirty feet, in length, including length underground, except at highways or where obstructions exist, where the poles will be of such height as may be required by statute or necessary because of physical conditions existing, or to protect other wires or structures rightfully upon the said right of way; that the poles will be about ten inches in diameter at the base, planted from [99—73] four to eight feet in the ground, according to the length of the poles and in such position upon said right of way as safe and proper construction will permit; the poles to be placed upon that portion of said right of way between a line five feet from the outer edge thereof and a line twenty-five feet from the center of the main track of said railway company, except where the right of way may be less than sixty feet in width or where the location of the main track upon the right of way, or the location of buildings, tracks or other improvements or obstructions upon the right of way, may make it impossible to place poles upon that portion of the right of way above described, in which event, the poles will be placed upon the most practicable remaining portion of the right of way consistent with the safe and proper

construction of said telegraph line; said portion of said right of way to be designated by said railway company, or its lessees, so as not to interfere with the ordinary travel or use of said railroad; that the poles will be set about one hundred sixty-five feet apart, making a total of thirty-two to thirty-five poles to the mile, excepting at sharp angles, where they may be not less than seventy-five feet apart, and around curves where they may be from one hundred seventeen to one hundred thirty-one feet apart; the poles to be equipped with cross-arms about ten feet long at or near the top of the poles, fastened at about the middle of the cross-arms to the poles, and along and upon said cross-arms or poles or upon said cross-arms and poles will be strung a sufficient number of wires to transact such business as will be given to the telegraph company by the United States [100—74] Government and the public; that said line of poles and wires will be constructed of the best material and by the most approved methods of construction and will be so constructed, maintained and operated as not to interfere with the ordinary travel or use of said railroad; that wherever it becomes necessary for said telegraph line to cross said right of way, the said crossing will be made by having its poles at such crossing so erected, and its wires so insulated, and strung so high above said railroad track, as to prevent any injury to, or interference with, the employees or property of the said railway company; that if at any time said railway company, its successors or lessees, shall require for railroad purposes the im-

mediate use of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, the said petitioner, will, at its own expense, remove its line to some other place to be designated by the said railway company adjacent thereto, on said right of way, so as not to interfere with the use of said right of way for railroad purposes; that said telegraph line will not be erected on any embankment cut, or slope of said right of way without the consent of said railway company; and if at any time said railway company, or its lessees, shall require its entire right of way for railroad purposes at any point, the said telegraph company, the petitioner herein, will, at such point or points, remove its line entirely off said right of way.

You are further instructed that this Court has heretofore, as required by the statutes under which this proceeding is authorized, entered its preliminary finding and decree that the aforesaid use for which the [101—75] designated portion of said right of way is sought to be appropriated, is really a public use, and that the public interest requires the prosecution of said enterprise, and that the land sought to be appropriated herein is required and necessary for the purposes of construction, maintenance and operation of said telegraph line; so that the only question for the determination of the jury herein is the amount of damages to be awarded the defendant for the right and easement to construct, reconstruct, maintain and operate its said telegraph line over and upon the aforesaid right of way of the defendant railway company, in the manner and

upon the terms and conditions hereinbefore described and set forth.

You are further instructed that the petitioner, Postal Telegraph-Cable Company of Washington, will, by the decree to be entered by this Court, be bound by the descriptions, terms, conditions and stipulations hereinbefore set forth in these instructions, all of which it will be your duty to take into consideration in determining the said question of damages and arriving at your verdict herein.

In this proceeding, the land along and over which the petitioner seeks to acquire the right and privilege of constructing and maintaining its telegraph line, is owned and held by the defendant company as a right of way for its railway and is therefore already devoted to a public use. The law of this State, however, permits a telegraph company, in such a proceeding as this, to acquire such an easement over the right of way of a railway company, provided that such appropriation does not interfere with the operation of such railway, [102—76] and provided, also, that just compensation be first paid to the defendant company. The right of the petitioner to appropriate the easement sought for its telegraph line upon the right of way of the defendant railway company, as you have heretofore been told, has been determined by the Court; it is for you, however, to determine from the evidence in this case under the instructions given you by the Court, the amount of compensation to be paid therefor to the defendant.

You are instructed that the law requires a railway

company to use reasonable diligence in keeping its right of way cleared from inflammable material, and that where it fails to do so and damage results therefrom, the railway company is liable; and if you should find from the evidence that it is necessary or desirable for the railway company, in order to prevent the setting out and spreading of fires in the operation of its trains, or for any other necessary or appropriate railway use or purpose, to clear and burn the brush, weeds or grass from time to time which may grow upon its right of way, the expense thereof would not be chargeable to the petitioner herein in this proceeding; provided, however, that if you find from the evidence that the necessary expense thereof would in any material or substantial degree be increased by reason of the construction and maintenance of the proposed telegraph line upon said right of way, such additional expense, if any, may be considered by you in arriving at your verdict. In considering that question, however, you are instructed that you are not to consider mere fancied or imaginary difficulties, obstructions or obstacles, but only such [103—77] as are substantial and appreciable.

You are further instructed that if upon careful consideration of all the evidence in this case and of the stipulations made by the telegraph company, the petitioner herein, you find that no material or substantial damage will be suffered by the railroad company in its enjoyment and use of its right of way for railroad purposes, by reason of the appropriation by the petitioner of the right of way for its

telegraph line in the manner and upon the terms and conditions set forth in its petition, as heretofore explained to you, then it will be your duty to return a verdict for the defendant for nominal damages only. But by this instruction the Court does not intend to intimate to you in any manner any view which it may entertain as to the amount which you should award the defendant herein.

You are further instructed that there is nothing in the final decree to be entered herein that imposes any responsibilities upon the petitioner, the Postal Telegraph-Cable Company, with reference to the maintenance of any part of the right of way of the defendant, but that as far as the public is concerned, the same liability is imposed upon the defendant, to care for, clear and protect the same as if the petitioner did not occupy any part thereof.

You are further instructed that under the petition in this case the railway company will have no right to use either the poles or wires of the telegraph company along its right of way without making compensation to the telegraph company therefor.

You are not concerned with the question of the [104—78] necessity for the occupancy by the petitioner with its telegraph line of the right of way of the defendant, as the public necessity therefor was for the determination by the Court and has heretofore been determined in favor of the petitioner. The question for your consideration is the amount of compensation in money to be awarded to the defendant by reason of taking and injuriously affecting of the right of way of the defendant, and

this should be determined irrespective of any benefit from any improvement proposed by the petitioner. As a railroad right of way can only be used for railroad purposes, it has no market value as land, and when a telegraph company seeks to condemn an easement for its lines, the just compensation must be arrived at by considering how much the use of the right of way for railroad purposes is diminished in value by the presence of the telegraph line. That is, the measure of damages is the diminution in value of the right of way for railroad purposes caused by the construction, maintenance and operation of the telegraph line, and in determining this question you should take into consideration all the stipulations contained in the petition pertaining to the manner in which the petitioner will exercise the easement in question, the substance of which petition and the stipulations therein contained has already been read to you.

While the just compensation which it is your duty to award must be arrived at by considering how much the use of the defendant's right of way for railway purposes is diminished in value by the presence of the telegraph line of the petitioner, to be constructed pursuant to the stipulations contained in the petition, [105—79] you are instructed that in arriving at such amount you are not to award anything for remote contingent or speculative consequences.

The petition in effect avers that the petitioner desired and preferred to secure by contract the perpetual right and privilege of constructing, main-

taining and operating its telegraph line along the right of way of the defendant company, and that it has heretofore made earnest and *bona fide* efforts to agree with the railway company for such right, and the compensation to be paid therefor, and that the railway company has refused to give its consent to the petitioner for such right and privilege, and has failed and refused to agree on the compensation to be paid therefor. You are instructed that these allegations are wholly immaterial, and if you find that any evidence was offered in support thereof, you should wholly disregard the same. In a proceeding of this character, the law does not make it a condition precedent for the petitioner to allege and prove that it undertook to agree or failed to agree with the defendant, and if any such endeavor was made, it is wholly immaterial, and it is equally immaterial whether the railway company did or did not refuse to give such consent to the petitioner, or whether the railway company did or did not fail to agree on the compensation to be paid therefor.

The eighth paragraph of the petition among other things avers, "and petitioner avers that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars." This allegation [106—80] is not to be construed by you for or against either party in this cause, its effect being purely for the Court as one of the elements in determining the jurisdiction of this court. In other words, it is not to be construed by you as an admission on the part of the petitioner that the award to be made by you should equal or

exceed the sum, nor should it be construed by you as any inference that the defendant is not entitled to a greater or less sum than three thousand dollars, exclusive of interest and costs.

At the conclusion of the opening statement of the attorney for the petitioner, the defendant made a motion to dismiss this cause for want of jurisdiction, which motion was denied. Again, at the conclusion of the petitioner's testimony a similar motion was made, and again denied. You are instructed that you are not to consider either of these motions or either of the rulings thereon in any manner. They involved purely jurisdictional questions solely addressed to the Court, and in which you are in no manner concerned, and you are not to consider the same in any manner, or the ruling of the Court thereon, as expressive of any opinion the Court may entertain upon the question submitted to you for your consideration.

Harmonize the testimony of all the witnesses who have testified before you, and if this can be done in theory consistent with the truth, you must do so. But if you find any witness has willfully testified falsely concerning any material matter or fact in this case, you have the right to disregard his entire testimony except in so far as you may find it corroborated by other credible [107—81] witnesses and circumstances detailed and developed upon the trial.

While you are the sole and exclusive judges of the amount, under the evidence, to be awarded herein, you are instructed that the law of this case you must

take from the Court. You will disregard anything counsel may have said to you in their argument on the facts in this case, or on any matter addressed to the Court, except in so far as their statements may be sustained by or properly inferable from the evidence in the case. In determining the weight or credit you desire to attach to the testimony of any witness, you should apply the same tests as you would do to any person in the ordinary affairs in life whose truth or falsity is to be considered by you.

You are the sole and exclusive judges of the credibility of the witnesses who have testified before you. In determining the weight or credit you desire to attach to the testimony of any witness, you will have the right to take into consideration, and it is your duty to do so, the demeanor of the witnesses upon the witness-stand, their opportunity of knowing about the things concerning which they testify, their interest or lack of interest in this case, the reasonableness of the stories of the several witnesses who have testified before you, their demeanor and manner of testifying, and from all these determine where the truth in the case lies.

You will consider this case in a dispassionate manner and without sympathy or prejudice for one side or the other.

You will take with you to the jury-room the petition and order adjudicating necessity herein, the [108—82] latter for the purpose of determining therefrom the description of the easement sought to be condemned herein. You will not regard either

as evidence in the cause further than as you have otherwise been instructed you should, in determining the measure of compensation to be awarded, take into consideration all the stipulations contained in the petition pertaining to the manner in which the petitioner will exercise the easement in question. These stipulations are binding upon the petitioner. The exhibits which have been admitted by the Court will also be sent to the jury-room, and these you should consider in connection with the evidence in the case.

You can return but one form of verdict in this cause, which form is as follows: Omitting the title of the court and cause contained in the verdict—"We, the jury duly empaneled in the above-entitled cause, do find that the compensation to be paid in money, irrespective of any benefit from the proposed telegraph line of the petitioner to the above-named defendant, Northern Pacific Railway Company and all persons interested, whether as tenants, encumbrancers, or otherwise, for the taking and injuriously affecting the lands described in the petition and order adjudicating necessity, is the sum of ——— dollars. ———, Foreman."

It will require all of your members to agree upon a verdict in this case, and when you have agreed upon the verdict you will insert the amount which you find should be awarded, in the blank space provided therefor in the foregoing form of verdict, and you will have your foreman sign it, and you will then report to [109—83] the Court. Upon your retirement you will appoint one of your number

foreman. You may now retire, gentlemen of the jury.

Upon the close of the instructions the jury retired to deliberate upon its verdict. Whereupon the petitioner in open court took the following exceptions, which were allowed by the Court:

[Petitioner's Exceptions to Instructions Given and Refused.]

The petitioner excepts to the refusal of the Court to give instruction No. 5, requested by the petitioner, and which requested instruction reads as follows:

As I have already indicated, the right of way of the railway company is owned and held by it solely for railroad purposes. It cannot sell, transfer, encumber or use it except as necessity and convenience may demand for the proper operation of its road. It can, therefore, have no market value because it cannot be placed upon the market, either at public or private sale. In considering the question of compensation to be awarded to the defendant herein, you are therefore instructed that you are not to consider any evidence that may have been introduced or any knowledge possessed by individual members of the jury, bearing upon the market value of the right of way, or any portion thereof, or of lands adjacent thereto; for in this proceeding you are called upon to consider only the uses to which this right of way is or will be devoted by the railway company on the one hand, and the telegraph company on the other, and to determine to what extent,

if any, the use of said right of way by the railway company for railroad purposes will be diminished or damaged by the use which the telegraph company, the petitioner herein, seeks to acquire in this proceeding for the maintenance and operation of its telegraph line.

The petitioner excepts to the refusal of the Court to give the first paragraph of the sixth instruction requested by the petitioner, and which paragraph of said requested instruction reads as follows:

You are further instructed that the statutes of the State of Washington do not impose any express duty upon the defendant railway [110—84] company to cut or burn the brush growing on its right of way, nor to keep the same free from grass, weeds, brush or trees; neither does it impose any such express duty upon the telegraph company. If, however, the defendant railway company does clear its right of way of timber, slashings, choppings, and brush, then it is made its duty under the laws of this State, as rapidly as the clearing or cutting progresses and the weather conditions permit, or at such times as the forester or any of his assistants, or any fire warden may direct, to obtain a permit and to pile and burn the same on such right of way.

The petitioner excepts to the refusal of the Court to give petitioner's requested instruction No. 7, which requested instruction reads as follows:

You are further instructed that if you believe from the evidence that the clearing of brush and other undergrowth immediately surrounding the

poles of the telegraph company would require additional time and expense, then the defendant railway company will owe no duty to the telegraph company to cut or remove such brush and undergrowth, and it need not incur such additional expense unless you believe from the evidence that the cutting of such brush or undergrowth immediately around said telegraph poles would be necessary for the safe and proper operation of defendant's railway trains and business or to prevent the spread of fires from the said railway across its right of way to adjoining land.

The petitioner excepts to the refusal of the Court to give petitioner's requested instruction No. 8, which requested instruction reads as follows:

In other words, gentlemen of the jury, the Court instructs you that the measure of damages in this case would be the amount, if any, which the value of the use of the right of way of the railroad company for railroad purposes is diminished by the appropriation of the easement on the same for the purpose of erecting and maintaining the telegraph line of the petitioner, in the manner and upon the conditions hereinbefore described. The evidence introduced in this case by the respective parties, the Court has permitted for the purpose of establishing or throwing light upon this question, and you are to consider such evidence solely for that purpose.

The petitioner excepts to the refusal of the Court to give petitioner's requested instruction No. 9, [111—85] which requested instruction reads as follows:

It will be your duty to ascertain from the evidence in this case what will be just compensation to the defendant company for the actual damages, if any, in the use of its right of way for railroad purposes; which may be occasioned by the appropriation by the petitioner of its proposed easement for its telegraph line; in determining this question you are instructed that nothing should be allowed for speculative damages or for such remote or inappreciable damages as the imagination may conjure up.

You are likewise instructed that you must not consider any advantages or benefits which may accrue to the telegraph company from its use of the railroad's right of way, in the assessment of damages. The railroad company can only claim compensation for such damages as will actually result to it in the use of its right of way for railroad purposes, by reason of the construction and maintenance of the telegraph line.

The petitioner excepts to the refusal of the Court to give petitioner's requested instruction No. 10, which requested instruction reads as follows:

You are further instructed that in determining the question of defendant's damages herein, it will be your duty to take into consideration the nature and extent of the easement which the petitioner, by the terms of its petition filed herein, seeks to acquire, and likewise the stipulations by which it has proposed to bind itself herein. These descriptions and stipulations will, by the decree which will be entered herein by the Court, bind

the petitioner at all times hereafter and will determine and limit the rights which it acquires by this proceeding. Among other things, the petitioner binds itself that if at any time the defendant railway company, or its successors in interest, shall require for railroad purposes the immediate use of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, it will, at its own expense, remove its line to some other place to be designated by the railway company, adjacent thereto on said right of way, so as not to interfere with the use of said right of way for railroad purposes. It likewise binds itself that its telegraph line will not be erected on any bank or slope of said right of way without the consent of the railway company; and also, that if at any time, said railway company [112—86] shall require its entire right of way for railroad purposes at any point, the petitioner will, at such point or points, remove its line entirely off the right of way.

The petitioner excepts to the modification by the Court of instruction No. 11, as requested by the petitioner, and to the giving of the instruction as so modified by the Court. Said instruction No. 11 was as follows:

You are further instructed that if upon careful consideration of all the evidence in this case and of the stipulations made by the telegraph company, the petitioner herein, you find that no material or substantial damage will be suffered by the railroad company in its enjoyment and use

of its right of way for railroad purposes, by reason of the appropriation by the petitioner of the right of way for its telegraph line in the manner and upon the terms and conditions set forth in its petition, as heretofore explained to you, then it will be your duty to return a verdict for the defendant for nominal damages only.

The Court modified said instruction by adding the following sentence:

But by this instruction the Court does not intend to intimate to you in any manner any view which it may entertain as to the amount which you should award the defendant herein.

The petitioner excepts to the giving by the Court of instruction No. 4, requested by the defendant, which instruction was as follows:

You are further instructed that there is nothing in the final decree to be entered herein that imposes any responsibilities upon the petitioner, the Postal Telegraph-Cable Company, with reference to the maintenance of any part of the right of way of the defendant, but that as far as the public is concerned, the same liability is imposed upon the defendant, to care for, clear and protect the same as if the petitioner did not occupy any part thereof. [113—87]

The petitioner excepts to the giving by the Court of instruction No. 10, requested by the defendant, which instruction was as follows:

You are further instructed that under the petition in this case the railway company will have no right to use either the poles or wires of the

telegraph company along its right of way without making compensation to the telegraph company therefor.

Order Settling Bill of Exceptions.

The foregoing entitled cause coming on regularly for hearing before the Court on this 3d day of March, 1913, the time duly designated by the Court for settling and certifying the bill of exceptions therein, the petitioner and the defendant now appearing by their respective attorneys of record herein, and the said petitioner having within the time extended by stipulation and order of the Court herein for that purpose, duly proposed the foregoing as a bill of exceptions in said action, and the parties now agreeing to the settlement of the foregoing as the bill of exceptions in this action,—

Now, therefore, it is by the Court and the Judge of said court presiding at the trial of said cause, ORDERED and CERTIFIED that the foregoing be and the same hereby is settled as the true bill of exceptions in said cause, and that said bill of exceptions, together with the exhibits therein referred to and thereto [114—88] attached includes all the material facts and evidence herein, and the same is hereby approved, allowed and made a part of the record herein, and the same being so settled and certified, it is hereby ordered to be filed herein by the clerk.

CLINTON W. HOWARD,

Judge.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington. Mar.

3, 1913. Frank L. Crosby, Clerk. By E. M. L.,
Deputy. [115—89]

[Plaintiff's Exhibit No. 1.]

POSTOFFICE DEPARTMENT.

WASHINGTON.

November 6, 1912.

I, Charles P. Grandfield, Acting Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance filed August 29, 1904, in this Department.

In testimony whereof I have hereto set my hand and caused the seal of the Postoffice Department to be affixed, at the City of Washington, the day and year above written.

[Seal]

C. P. GRANDFIELD,
Acting Postmaster General.

G. G. S.

Case No. ——. Plaintiff's Exhibit 1. United States District Court, Western Dist. of Washington, P. T. & C. Co. vs. N. P. R. R. Co. Filed 11/20/1912.

FORM 23.

TO ALL WHOM IT MAY CONCERN:

Be it known, that the Postal Telegraph-Cable Company of Washington a corporate body organized under the laws of Washington, through its duly authorized officers, whose signatures are hereto attached, does hereby accept, without reservation, all of the restrictions and obligations of the Act of Congress approved July 24, 1866, entitled "An Act to aid in the construction of telegraph lines and to

secure to the Government the use of the same for postal, military, and other purposes." And the said company does hereby agree [116] that telegrams between the several Departments of the Government and their officers and agents shall at all times have priority over all other business in their transmission over the lines of said company, and that the charges for such telegrams shall not exceed the rates annually fixed by the Postmaster General.

This declaration of acceptance is made in order that said Postal Telegraph-Cable Company of Washington may be entitled to the rights and privileges granted by the Act of Congress aforesaid.

Done at New York City this 22d day of August, 1904.

POSTAL TELEGRAPH-CABLE COM-
PANY OF WASHINGTON.

By WM. H. BAKER, President.

Attest: CHAS. P. BRUCH, Secretary.

Postal Telegraph-Cable Company of Washington
Incorporated
1904
Washington.
248

ACCEPTANCE BY THE POSTAL TELE-
GRAPH-CABLE COMPANY OF WASHING-
TON

Of the obligations and restrictions of the Act of Con-
gress approved July 24, 1866.

Date: Aug. 22, 1904.

Received Aug. 29, 1904.

Address of Company:
CHAS. P. BRUCH, Secretary,
253 Broadway,
New York City.

[Indorsed]: Case No. Plaintiff's Exhibit 1.
United States District Court, Western Dist. of
Washington. P. T. & C. Co. vs. N. P. R. R. Co.
Filed 11/20/1912. [117]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,
Plaintiff in Error,
vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Defendant in Error.

Assignment of Errors.

Comes now Postal Telegraph-Cable Company of
Washington, a corporation, plaintiff in error in the
above numbered and entitled cause, and in connec-
tion with its petition for a writ of error in this cause
assigns the following errors which plaintiff in error
avers occurred on the trial thereof, and upon which
it relies to reverse the judgment entered herein as
appears of record:

I.

Horace Middaugh, witness on behalf of plaintiff in

error, having testified that he had been engaged in the railroad business about twenty-three years; that he was superintendent of bridges, buildings and track, and had charge of the right of way between Seattle and Sumas, being the right of way involved in this proceeding, between the years 1889 and 1899, inclusive, and an issue in said cause being the damage, if any, to the use and operation of said right of way by the defendant in error railway company for railway [118] purposes by reason of the construction, maintenance and operation of the telegraph line by the plaintiff in error, as proposed in its petition herein, the following question was propounded to said witness, to wit: "Q. Mr. Midgah, from your knowledge of the right of way on this line from Seattle to Sumas, what would you say as to whether the construction and maintenance of a telegraph line would cause any injury or damage to the use and operation of the right of way of the railroad company for railroad purposes; if so, what?" To which question defendant in error objected on the ground that the witness had not shown himself to be qualified.

And plaintiff in error avers that the Court erred in sustaining said objection and refusing to permit the witness to testify in answer to said question, to which ruling of the Court the plaintiff in error excepted and its exception was allowed.

II.

The Court erred in permitting J. E. Craver, witness on behalf of defendant in error, to testify of particular instances of poles falling upon the rail-

way track because they were placed too close thereto, in answer to the following question propounded by defendant in error, to wit: "Q. Mr. Craver, I wish you would state to the jury from your experience as an operating man, what, if any, added expense or embarrassment there is under which this line would be operated by reason of the danger of the falling of poles and the like—poles to be constructed as provided under this petition." Which question was objected to as incompetent, irrelevant and immaterial, and as remote, contingent and uncertain. The objection was overruled and the exception of plaintiff in error duly taken and allowed. [119]

III.

The Court erred in permitting the said witness Craver to testify that it cost defendant in error additional expense in protecting certain existing telegraph poles on right of way of defendant in error in doing certain work in which the railway company was then engaged in answer to the following question propounded by the defendant in error, to wit: "Q. Mr. Craver, I wish you would state to the jury, in doing that work that is being done around the Pilchuck where you are cutting out the grades and making a new fill, whether or not in doing that work, irrespective of the fact of obligations similar to those contained in this petition, if there is any added expense in making your fills around those poles or making your cuts under the poles." To which plaintiff in error objected as irrelevant, immaterial and incompetent, which objection was over-

ruled and the exception of plaintiff in error thereto duly allowed.

IV.

The defendant in error, having introduced in evidence testimony tending to show special damage on account of the construction, maintenance and operation of the proposed telegraph line of the plaintiff in error in clearing and burning the brush on its right of way, in that additional expense would be involved in cutting the brush around the telegraph poles and in piling said brush and burning the same so as to avoid injury or damage to the proposed telegraph poles and wires of the plaintiff in error, the said plaintiff in error sought to prove in rebuttal, by one E. Colburn, civil engineer, a competent and experienced witness acquainted with said right of way, what was the character of the land embraced [120] therein with respect to its susceptibility for growing weeds, grass and brush, and what, if any, would be the additional labor or time required in the periodical clearing of the right of way of brush by reason of the presence of the proposed telegraph poles, and sought to show by said witness that no material additional labor, time or expense would be incurred by the defendant in error in clearing and burning the brush in said right of way by reason of the presence of the proposed telegraph line; to all of which testimony the defendant in error objected on the ground that it was not rebuttal, and the Court erred in sustaining said objection, to which rulings of the Court the defendant in error excepted and its exception was allowed.

V.

The Court likewise erred in refusing to permit the witness J. J. Lynch, a competent and experienced person, to testify in rebuttal that the cutting of brush on right of way of defendant in error would require no additional time or expense because of the presence of the proposed telegraph poles thereon, and erred in sustaining the objection to said testimony on the ground that the same was not rebuttal, to which ruling of the Court defendant in error excepted and its exception was allowed.

VI.

The Court erred in refusing to give instruction No. 5 requested by the plaintiff in error, which requested instruction reads as follows:

“As I have already indicated, the right of way of the railway company is owned and held by it solely for railroad purposes. It cannot sell, transfer, encumber or use it except as necessity and convenience may demand for the [121] proper operation of its road. It can, therefore, have no market value because it cannot be placed upon the market, either at public or private sale. In considering the question of compensation to be awarded to the defendant herein, you are therefore instructed that you are not to consider any evidence that may have been introduced or any knowledge possessed by individual members of the jury bearing upon the market value of the right of way, or any portion thereof, or of lands adjacent thereto; for in this proceeding you are called upon to consider only the uses to which

this right of way is or will be devoted by the railway company on the one hand, and the telegraph company on the other, and to determine to what extent, if any, the use of said right of way by the railway company for railroad purposes will be diminished or damaged by the use which the telegraph company, the petitioner herein, seeks to acquire in this proceeding for the maintenance and operation of its telegraph line.”

VII.

Defendant in error having introduced testimony tending to show that in cutting the brush on the right of way it could not be burned as it fell because of the presence of the telegraph poles and wires, but that additional labor and expense would be required in order to pile the brush so as to avoid injury and damage to said telegraph poles and wires in burning said brush, the court erred in refusing to give the first paragraph of the 6th instruction requested by the plaintiff in error, which reads as follows:

“You are further instructed that the statutes of the State of Washington do not impose any express duty upon the defendant railway company to cut or burn the brush growing on its right of way, nor to keep the same free from grass, weeds, brush or trees; neither does it impose any such express duty upon the telegraph company. If, however, the defendant railway company does clear its right of way of timber, slashings, chop-pings, and brush, then it is made its duty under the laws of this state, as rapidly as the clearing or cutting progresses and the weather conditions

permit or at such times as the forester or any of his assistants, or any fire warden may direct, to obtain a permit and to pile and burn the same on such right of way." [122]

VIII.

The Court erred in refusing to give instruction No. 7 requested by the plaintiff in error, which requested instruction reads as follows:

"You are further instructed that if you believe from the evidence that the clearing of brush and other undergrowth immediately surrounding the poles of the telegraph company would require additional time and expense, then the defendant railway company will owe no duty to the telegraph company to cut or remove such brush and undergrowth, and it need not incur such additional expense unless you believe from the evidence that the cutting of such brush or undergrowth immediately around said telegraph poles would be necessary for the safe and proper operation of defendant's railway trains and business or to prevent the spread of fires from the said railway across its right of way to adjoining land."

IX.

The Court erred in refusing to give the 9th instruction requested by plaintiff in error, which requested instruction reads as follows:

"It will be your duty to ascertain from the evidence in this case what will be just compensation to the defendant company for the actual damages, if any, in the use of its right of way for railroad purposes, which may be occasioned by the appro-

priation by the petitioner of its proposed easement for its telegraph line; in determining this question you are instructed that nothing should be allowed for speculative damages or for such remote or inappreciable damages as the imagination may conjure up.

You are likewise instructed that you must not consider any advantages or benefits which may accrue to the telegraph company from its use of the railroad's right of way, in the assessment of damages. The railroad company can only claim compensation for such damages as will actually result to it in the use of its right of way for railroad purposes, by reason of the construction and maintenance of the telegraph line." [123]

X.

The Court erred in refusing to give the 10th instruction requested by plaintiff in error, which instruction reads as follows:

"You are further instructed that in determining the question of defendant's damages herein, it will be your duty to take into consideration the nature and extent of the easement which the petitioner, by the terms of its petition filed herein, seeks to acquire, and likewise the stipulations by which it has proposed to bind itself herein. These descriptions and stipulations will by the decree which will be entered herein by the Court, bind the petitioner at all times hereafter and will determine and limit the rights which it acquires by this proceeding. Among other things, the petitioner binds itself that if at any time the defendant rail-

way company, or its successors in interest, shall require for railroad purposes the immediate use of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, it will, at its own expense, remove its line to some other place to be designated by the railway company, adjacent thereto on said right of way, so as not to interfere with the use of said right of way for railroad purposes. It likewise binds itself that its telegraph line will not be erected on any bank or slope of said right of way without the consent of the railway company; and also, that if at any time, said railway company shall require its entire right of way for railroad purposes at any point, the petitioner will, at such point or points, remove its line entirely off the right of way."

XI.

The Court erred in modifying the 11th instruction requested by the plaintiff in error and in giving said modification as a part of its instruction to the jury. Said instruction No. 11 was as follows:

"You are further instructed that if upon careful consideration of all the evidence in this case and of the stipulations made by the telegraph company, the petitioner herein, you find that no material or substantial damage will be suffered by the railroad company in its [124] enjoyment and use of its right of way for railroad purposes, by reason of the appropriation by the petitioner of the right of way for its telegraph line in the manner and upon the terms and condi-

tions set forth in its petition, as heretofore explained to you, then it will be your duty to return a verdict for the defendant for nominal damages only."

The Court modified said instruction by adding the following sentence:

"But by this instruction the Court does not intend to intimate to you in any manner any view which it may entertain as to the amount which you should award the defendant herein."

XII.

The Court erred in giving the 4th instruction requested by the defendant in error, which instruction is as follows:

"You are further instructed that there is nothing in the final decree to be entered herein that imposes any responsibilities upon the petitioner, the Postal Telegraph-Cable Company, with reference to the maintenance of any part of the right of way of the defendant, but that as far as the public is concerned, the same liability is imposed upon the defendant, to care for, clear and protect the same as if the petitioner did not occupy any part thereof."

XIII.

The Court erred in giving the 10th instruction requested by the defendant in error, which instruction is as follows:

"You are further instructed that under the petition in this case the railway company will have no right to use either the poles or wires of the telegraph company along its right of way

without making compensation to the telegraph company therefor."

WHEREFORE, plaintiff in error prays that the judgment of said court be reversed and said cause be remanded for trial.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Plaintiff in Error. [125]

Copy of within Assignment of Errors received and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,
Atty. for Defendant.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [126]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Petition for Order Allowing Writ of Error.

The said petitioner, Postal Telegraph-Cable Company of Washington, a corporation, feeling itself

aggrieved by the judgment for damages entered in said cause on the 3d day of March, 1913, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of said petitioner, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said Court for an order allowing the said petitioner to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said petitioner shall give upon said writ of error. And further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and your petitioner will ever pray.

Dated this 21st day of March, A. D. 1913.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Petitioner, [127]

Copy of within Petition for Order Allowing Writ of Error received and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,

Atty. for Defendant.

Indorsed: Petition for Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [128]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

**Order Granting Writ of Error and Fixing Amount
of Bond.**

This cause coming on this day to be heard in the courtroom of said court in the city of Seattle, Washington, upon the petition of the petitioner, Postal Telegraph-Cable Company of Washington, a corporation, herein filed, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

The Court having duly considered the same does hereby allow the said writ of error prayed for, and

it is ORDERED that the amount of the cost bond to be given by said petitioner on such writ of error be and the same hereby is fixed at the sum of One Thousand Dollars.

Done in open court this 21st day of March, 1913.

EDWARD E. CUSHMAN,

Judge. [129]

Copy of within Order Granting Writ of Error and Fixing Amount of Bond received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,

Atty. for Defendant.

Indorsed: Order Granting Writ of Error and Fixing Amount of Bond. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [130]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

Cost Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, Postal Telegraph-Cable Company of Washington, a corporation, the above-named petitioner, as principal, and New England Casualty Company, a body corporate, duly incorporated under the laws of the State of Massachusetts and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the Northern Pacific Railway Company, a corporation, the above-named defendant, in the sum of One Thousand Dollars, to be paid to said defendant, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Scaled with our seals and dated this 21st day of March, A. D. 1913.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT

WHEREAS in the above court and cause judgment for damages was rendered and entered on the 3rd day of March, 1913; and

WHEREAS, the said petitioner has obtained from said [131] court a writ of error to reverse the said judgment in said action and a citation directed to the defendant is about to be issued citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California;

NOW, THEREFORE, if the said petitioner, Pos-

tal Telegraph-Cable Company of Washington, a corporation, shall prosecute the said writ of error to effect, and shall answer all costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

POSTAL TELEGRAPH-CABLE COMPANY OF WASHINGTON,

By J. J. DUNNE, [Seal]

Its Agent.

By HUGHES, McMICKEN, DOVELL & RAMSEY,

Its Attorneys.

NEW ENGLAND CASUALTY COMPANY.

[Seal]

By C. M. SEELEY,

Atty. in Fact.

SEELEY & CO.,

By N. BURSCHER,

General Agent.

The sufficiency of the surety on the foregoing bond approved by me this 21st day of March, A. D. 1913.

EDWARD E. CUSHMAN,

Judge of said Court.

Copy of within Cost Bond received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,

Atty. for Defendant. [132]

Indorsed: Cost Bond. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 21, 1913.

Frank L. Crosby, Clerk. By E. M. L., Deputy.
[133]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Writ of Error [Copy].

United States of America,—ss.

The President of the United States of America to
the Judges of the District Court of the United
States, for the Western District of Washington,
Northern Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment for damages of the
plea which is in the said District Court before you,
or some of you, between the Postal Telegraph-Cable
Company of Washington, a corporation, petitioner,
and Northern Pacific Railway Company, a corpora-
tion, defendant, a manifest error hath happened, to
the great damage of the said Postal Telegraph-Cable
Company of Washington, a corporation, petitioner,
as is said and appears by the complaint, we being
willing that such error, if any hath been, should be

duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city [134] of San Francisco, in the State of California, together with this writ, so that you have the same at the said place in the said Circuit Court of Appeals, to be then and there held on the 19th day of April, 1913, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 21st day of March, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal]

FRANK L. CROSBY,

Clerk of said District Court of the United States,
for the Western District of Washington.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN.

United States District Judge for the Western District of Washington.

Received copy of the foregoing writ of error

lodged with me for defendant in error this 21st day of March, 1913.

[Seal]

FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington. [135]

Copy of within Writ of Error received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,
Atty. for Defendant in Error.

Indorsed: Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [136]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,
Plaintiff in Error,
vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,
Defendant in Error.

Citation on Writ of Error [Copy].

United States of America,—ss.

To Northern Pacific Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court

of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the 19th day of April, 1913, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Postal Telegraph-Cable Company of Washington, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated the 21st day of March, A. D. 1913.

EDWARD E. CUSHMAN,
United States District Judge, for the Western District of Washington. [137]

[Seal] Attest: FRANK L. CROSBY,
Clerk of said United States District Court for the Western District of Washington.

By _____,
Deputy.

Copy of within Citation received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,
Atty. for Defendant in Error.

Indorsed: Citation. Filed in the U. S. District Court, Western District of Washington, Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [138]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

Stipulation as to Record.

IT IS HEREBY STIPULATED, between the
parties hereto, that the Clerk of this Court in mak-
ing up his return to the writ of error herein shall
include therein the following:

Petition, filed May 27, 1912.

Summons with return thereon, filed May 28, 1912.

Appearance of defendant, filed June 10, 1912.

Order adjudicating necessity, filed June 17, 1912.

Verdict, filed November 22, 1912.

Cost bill, filed November 25, 1912.

Motion for new trial, filed December 17, 1912.

Order denying motion for new trial, filed February
19, 1913.

Judgment, filed March 3, 1913.

Bill of exceptions, filed March 3, 1913, with pet'r's

Ex. 1.

Assignment of errors, filed March 21, 1913.

Petition for order allowing writ of error, filed March 21, 1913.

Order granting writ of error and fixing amount of bond, filed March 21, 1913. [139]

Cost bond, filed March 21, 1913.

Writ of error, filed March 21, 1913.

Writ of error (copy lodged with Clerk), filed March 21, 1913.

Citation and acceptance of service thereon, filed March 21, 1913.

Stipulation as to record, filed April 3d, 1913.

Which comprise all the papers, exhibits, depositions and other proceedings which are necessary to the hearing of said cause upon such writ of error in the United States Circuit Court of Appeals, and that no other papers or proceedings than those above mentioned need be included by the clerk of said court in making up his return to said writ of error as a part of such record.

Dated: April 1st, 1913.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Petitioner.
C. H. WINDERS,
Attorney for Defendant.

Indorsed: Stipulation as to Record. Filed in the U. S. District Court, Western Dist. of Washington. Apr. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [140]

[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing 140 type-written pages, numbered from 1 to 140, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, exhibits, depositions and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court and that the same constitute the record on return to said Writ of Error

herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for [141] the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828, R. S. U. S., as Amended by Sec. 6, Act of March 2, 1905) for mak- ing transcript of the record for printing purposes, 366 folios at 20c per folio.....	\$73.20
Certificate to certified copy of typewritten transcript of record.....	.30
Seal to said certificate.....	.40
	<hr/>
	\$73.90

I hereby certify that the above cost for preparing and certifying record amounting to \$73.90 has been paid to me by Messrs. Hughes, McMicken, Dovell & Ramsey, attorneys for petitioner.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my

hand and affixed the seal of said District Court at Seattle, in said District, this 11th day of April, 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

By Ed. M. Lakin,

Deputy. [142]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America to
the Judges of the District Court of the United
States, for the Western District of Washing-
ton, Northern Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment for damages of the
plea which is in the said District Court before you,
or some of you, between the Postal Telegraph-Cable
Company of Washington, a corporation, petitioner,
and Northern Pacific Railway Company, a corpora-
tion, defendant, a manifest error hath happened, to
the great damage of the said Postal Telegraph-Cable

Company of Washington, a corporation, petitioner, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same [143] to the United States Circuit Court of Appeals for the Ninth Circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place in the said Circuit Court of Appeals, to be then and there held on the 19th day of April, 1913, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 21st day of March, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal]

FRANK L. CROSBY,
Clerk of said District Court of the United States,
for the Western District of Washington.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,
United States District Judge for the Western Dis-
trict of Washington.

Received copy of the foregoing writ of error lodged with me for defendant in error this 21st day of March, 1913.

[Seal] FRANK L. CROSBY,
Clerk of United States District Court for the Western District of Washington. [144]

Copy of within Writ of Error received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,
Atty. for Defendant in Error. [145]

Indorsed: Original. No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Postal Telegraph-Cable Company of Washington, a Corporation, Plaintiff in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2178.

POSTAL TELEGRAPH-CABLE COMPANY OF
WASHINGTON, a Corporation,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Citation [on Writ of Error—Original].

United States of America,—ss.

To Northern Pacific Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, on the 19th day of April, 1913, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Postal Telegraph-Cable Company of Washington, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated the 21st day of March, A. D. 1913.

EDWARD E. CUSHMAN,

United States District Judge, for the Western District of Washington. [146]

[Seal]

Attest: FRANK L. CROSBY,
Clerk of said United States District Court for the
Western District of Washington.

By _____,

Deputy. [147]

Copy of within Citation received, and due service of same acknowledged this 21st day of March, 1913.

C. H. WINDERS,

Atty. for Defendant in Error. [148]

Indorsed: Original. No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Postal Telegraph-Cable Company of Washington, a Corporation, Plaintiff in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

Indorsed: No. 2268. United States Circuit Court of Appeals for the Ninth Circuit. Postal Telegraph-Cable Company of Washington, a Corporation, Plaintiff in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed April 16, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
 FOR THE NINTH CIRCUIT

No. 2268.

POSTAL TELEGRAPH-CABLE COMPANY OF WASHINGTON, a Corporation,	}	<i>Plaintiff in Error,</i>
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vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, <i>Defendant in Error.</i>	}	
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Upon Writ of Error to the United States District Court
 for the Western District of Washington,
 Northern Division.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This is a proceeding instituted under the eminent domain laws of the State of Washington. In order that the statement of the case may be rendered entirely clear and the questions arising upon this writ of error be better understood, we deem it

advisable to first set forth the provisions of the Constitution and statutes of the State of Washington applicable thereto.

Section 19 of Art. XII of the Constitution is as follows:

“Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other’s messages without delay or discrimination, and all of such companies are hereby declared to be common carriers and subject to legislative control. *Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights-of-way of such railroads and railroad companies*, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section.”

The first Legislature of the State passed a law to give effect to the above provision of the Constitution (Laws of 1890, p. 292). The provisions of this statute are embodied in the following sections of Vol. 2 of Remington & Ballinger's Annotated Codes and Statutes of Washington:

"§ 9300. The right of eminent domain is hereby extended to all telegraph and telephone corporations and companies organized or doing business in the state."

"§ 9302. Every railroad operated in this state, and carrying freight and passengers for hire, or doing business in this state, is and shall be designated a 'post road,' and the corporation or company owning the same shall allow telegraph and telephone companies to construct and maintain telegraph and telephone lines on and along the right of way of such railroad."

"§ 9303. No railroad corporation or company organized or doing business in this state shall allow any telegraph or telephone company, or any individual, any facilities, privileges or rates for transportation of men or material, or for repairing their lines, not allowed to all telegraph and telephone companies and individuals."

"§ 9314. Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of

telegraph or telephone for public traffic along and upon any public road, street, or highway, *along or across the right of way of any railroad corporation, and may erect poles, piers, or abutments for supporting insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters: Provided that when the right of way of such corporation has not been acquired by or through any grant or donation from the United States, or this State, any county, city, or town therein, then the right to construct and maintain such lines shall be secured only, by the exercise of the right of eminent domain, as provided by law:* Provided further, that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon."

"§ 9318. In case of the refusal or neglect of any railroad company or corporation to comply with the provisions of section 9302, said company or corporation shall be liable for damages in the sum of not less than one thousand dollars nor more than five thousand dollars for each offense, and one hundred dollars per day during the continuance thereof."

The statutes of the State providing the mode of exercising the right of eminent domain are, so far as material to a proper understanding of the case, contained in the following sections of Vol. 1 of Remington & Ballinger's Annotated Codes and Statutes of Washington:

§921 provides, in substance, that any corporation authorized by law to appropriate land, etc., may present to the Superior Court of the proper county a petition, describing with reasonable certainty the premises or other property sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by the corporation exercising the right, for the taking or injuriously affecting such lands, premises or other property, or that in case a jury be waived that the compensation be then ascertained and determined by the court.

§922 provides for the giving of notice and the contents thereof. §925 provides that at the time and place appointed for hearing said petition the court, or a judge thereof, shall, if satisfactory proof be furnished that the contemplated use is really a public use, enter an order adjudicating necessity and directing the summoning of a jury to ascertain the compensation to be paid. §926 provides for the hearing before the court and a jury, and that the jury shall ascertain and determine the award or amount of damages to be paid the owner for the

taking or injuriously affecting of the premises for the purpose of the enterprise, irrespective of any benefit from any improvement proposed thereby. It further provides that "upon the trial witnesses may be examined in behalf of either party to the proceedings as in civil actions;" and that upon the verdict of the jury judgment shall be entered for the amount of the damages awarded. And it further provides that in case a jury is waived, the compensation shall be ascertained and determined by the court or a judge thereof; and that the proceedings shall be the same as in trials of an issue of fact by the court. §927 provides that "at the time of rendering judgment for damages, whether upon default or trial, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated," etc. §931 provides that either party may appeal from the judgment for damages and that such appeal may bring before the appellate court the propriety and justness of the amount of damages.

The plaintiff in error is engaged in the telegraph business, with connecting telegraph lines throughout the United States of America and Dominion of Canada and with cable connections throughout the world, and owns and operates, among other telegraph lines, a line of telegraph poles and wires along and upon the right of way of the defendant North-

ern Pacific Railway Company from the intersection of Evanston Street in the City of Seattle northward to the international boundary line at the town of Sumas.

This telegraph line was constructed and has been maintained under and by virtue of a written contract entered into by and between the predecessors in interest of the plaintiff in error and of the defendant in error on the 17th of February, 1888; and said contract by its terms expired on the 17th of February, 1913. Before the expiration of said contract the plaintiff in error endeavored to secure by contract the perpetual right and privilege of constructing, reconstructing, maintaining and operating its said telegraph line on, upon, over and across the said right of way of the defendant Railway Company, but said Railway Company refused to give its consent for said right and privilege and refused to agree upon the compensation to be paid therefor. Thereupon, plaintiff in error filed its petition in this cause, on the 27th of May, 1912, in pursuance of the provisions of the foregoing statutes.

After setting out the foregoing matters and the necessary jurisdictional facts, the petition described the right of way of the defendant Railway Company and the general character and location of the telegraph line to be constructed and maintained upon said right of way; and, among other things, the following averments are set forth in this petition:

“Its poles to be erected as near the outer edge of said right of way as circumstances will permit, and in such position as not to interfere with the operation or safety of trains or with the use of the right of way by said railway company or its lessees, for its or their own purposes; * * * that said line is now and will at all times hereafter be constructed and reconstructed of the best material and by the most approved methods of construction, and will consist of a single line of poles not less than twenty (20) nor more than thirty (30) feet in length, including length underground, except at highways or where obstructions exist, where the poles will be of such a height as may be required by statute, or necessary because of physical conditions existing, or to protect other wires or structures rightfully upon the said right of way; that the poles will be about ten (10) inches in diameter at the base, planted from four (4) to eight (8) feet in the ground, according to the length of the poles, and in such positions upon said right of way as safe and proper construction permit; the poles to be placed upon that portion of said right of way between a line five feet from the outer edge thereof and a line twenty-five feet from the center of the main track, except where the right of way may be less than sixty feet in width, or where the location of the main track upon the

right of way, or the location of buildings, tracks or other improvements or obstructions upon the right of way may make it impossible to place the poles upon that portion of the right of way above described, in which event the poles will be placed upon the most practicable remaining portion of the right of way consistent with the safe and proper construction of said telegraph line, such portion of said right of way to be designated by said railway company or its lessees, so as not to interfere with the ordinary travel or use of said railroad; that the poles will be set about one hundred and sixty-five (165) feet apart, making a total of thirty-two (32) to thirty-five (35) poles to the mile, excepting at sharp angles, where there may be not less than seventy-five (75) feet apart, and around curves, where they may be from one hundred and seventeen (117) to one hundred and thirty-one (131) feet apart; the poles to be equipped with cross-arms about ten feet long, at or near the top of the poles, fastened at about the middle of the cross-arms to the poles, and along and upon said cross-arms or poles, or upon said cross-arms and poles, will be strung a sufficient number of wires to transact such business as will be given to the telegraph company by the United States Government and the public. That said line of poles and wires will be so constructed, maintained

and operated as not to interfere with the ordinary travel or use of said railroad.”

Said petition also contains the following express stipulations:

“This petitioner further avers that the only lands that will be actually taken or occupied by it by virtue of this proceeding will be about one square foot for each pole; that the space between the poles and under the wires can be used by said railway company or its lessees for all purposes for which it has heretofore been used; that wherever it becomes necessary for said telegraph line to cross said right of way the said crossing will be made by having its poles at such crossing so erected and its wires so insulated and strung so high above said railroad track as to prevent any injury to or interference with the employees or property of the said railway company; and this petitioner further stipulates that its said telegraph line will not interfere with any other telegraph or telephone line now rightfully upon said right of way. That if at any time the said railway company, its successors or lessees, shall require for railroad purposes the immediate use of any of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, this petitioner will, at its own expense, remove its line to some other place, to be desig-

nated by said railway company, adjacent thereto, on such right of way, so as not to interfere with the use of said right of way for railroad purposes. That said telegraph line will not be erected on any embankment or slope or any cut of said right of way, without the consent of said railway company; and if at any time said railway company or its lessees shall require its entire right of way for railroad purposes at any point, the telegraph company will at such point or points remove its line entirely off said right of way.”

On the 17th of June, 1912, upon due notice and after appearance by defendant in error, the Court entered its order adjudicating necessity, and ordering that a jury be impaneled to ascertain and determine the compensation to be made in money, as provided by the above statutes.

No answer or other pleading is expressly required on the part of the defendant under the eminent domain statutes of the State of Washington, and none was filed in this cause.

On the 19th of November, 1912, the proceeding came on for hearing before the Court and a jury duly impaneled to try said cause.

J. G. Blake, General Superintendent of the Pacific Division of the Postal Telegraph-Cable Company, testified on behalf of the plaintiff in error, describing the right of way of the Railway Company, and also the proposed location and con-

struction of the telegraph line of the plaintiff in error on said right of way. He further testified, after qualifying so to do, that the damage or diminution in the value of the use of the right of way by the Railway Company for railroad purposes occasioned by the appropriation of the right to construct and maintain the telegraph line, in the manner and upon the stipulations as set forth in the petition of the plaintiff in error, would be merely nominal.

J. A. Forehand, the Superintendent of the plaintiff in error, testified to the same effect; as did also J. J. Lynch, Superintendent of Construction for the Pacific Division of the Postal Telegraph system.

The plaintiff in error also produced and offered the testimony of Horace Middaugh, who had been engaged in the railroad business about twenty-three years, and who had been superintendent of bridges, buildings and track on the right of way in question from 1889 to 1899, but since that time had not been engaged in the railroad business. He was permitted to testify generally concerning the effect of the presence of a telegraph line on the right of way of a railway company, and that there would be no damage or diminution in the value of the use of a railroad right of way for railroad purposes caused by the construction and maintenance of a telegraph line in the manner proposed by the petition in this proceeding; but he was not permitted to answer the following question:

“Q. Mr. Middaugh, from your knowledge of the right of way on this line from Seattle to Sumas, what would you say as to whether the construction and maintenance of a telegraph line would cause any injury or damage to the use and operation of the right of way of the railroad company for railroad purposes—if so, what?” (Record p. 46.)

The defendant in error produced and examined a number of witnesses, none of whom was asked and none of whom testified as to the extent or amount of the depreciation in value, if any, of the use of the right of way in question for railroad purposes by reason of the construction and maintenance of the telegraph line of plaintiff in error in the manner and under the stipulations set forth in its petition.

L. M. Perkins, Engineer of Maintenance, was permitted to testify that the proposed telegraph line would cause an added annual expense in the maintenance of the right of way, saying:

“The added expense has not been made an exact matter of record by bookkeeping, but I would estimate from my general knowledge of the line in question and of the nature of it, that the specific and general items that add to the cost of the maintenance on that line by reason of the presence of a pole line would make an annual amount of about fifteen dollars per mile.
* * * I am taking into consideration the added

cost of clearing the right of way from brush; the added cost by reason of the particular items of clearing and pulling the brush and inflammable material away from poles to protect them from destruction by fire; the added cost by reason of the presence of poles between and adjacent to tracks, in the way of acting as obstructions to the handling of ties and tie renewals; the added cost by reason of the protection and care that is needed in the burning of old ties, and needed in order to protect the poles from fire and to protect the wire lines from damage; the added cost by reason of delays that occur in connection with construction, in waiting for poles to be moved, and the actual loss of the use of a certain amount of team track capacity by reason of poles being located beside team tracks and thereby preventing the use of a certain part of the team track," etc. (Record, pp. 63, 64.)

F. M. Smith, roadmaster of defendant in error, testified upon the same question as follows:

"It would increase the cost of maintenance in several ways. Places where our right of way is narrow, it would doubtless increase the cost of burning the old ties; that is, moving them to a place where sufficient clearance could be obtained from the wires so that we could burn them without injuring the wires and also in un-

loading our ties or piling them up; and, in places where the brush is rather heavy, in the cutting of the brush, we would have to pile the brush back from the poles and from under the wires so that when the slashing was burned it would not destroy the poles and the wires, and we have at various times when we do this burning to station men along to watch the burning so that the poles would not catch and burn up. And this labor represents dollars and cents and probably would increase the cost of maintenance considerably. In some certain sections in this burning and slashing probably it would increase the cost from twelve to fifteen dollars per mile," etc. (Record p. 68.)

W. H. Gale, roadmaster of defendant in error, testified upon the same question as follows:

"We have right of way on a part of our track that we have no poles on, and if we go once a year and cut that brush we can cut it irrespective of where it falls. We can let it fall anywhere except next to the fences. When the men are cutting brush they let it fall away from the fence. We do not make any pretense of piling the brush to burn it because it dries out better, and after we come to burn it we can get a better burn because it burns every weed on that right of way. It is our desire always when we burn it—it not only helps to burn the brush, but it sets it back by burning the

roots, and where you have a line of poles you have to protect those poles by cutting around the poles and throwing the stuff back a sufficient distance to save the poles. We have always done it. That has been the practice, and it is quite an item when you come to clear a right of way to clear away and keep it away and save the poles while you are burning it. * * * I would say at least ten or twelve dollars per mile, easily, for the difference in pulling away the brush. There have been a great many of the telegraph company's poles on fire at one time or another. The matter of extinguishing fires requires labor," etc. (Record p. 74.)

He testified, however, that there would be no difficulty encountered in burning old ties because of the presence of this telegraph line (Record, p. 77).

In like manner a number of section foremen testified that in their opinion the presence of the proposed telegraph poles and wires would cause an additional annual expense in cutting and piling brush on the right of way and in burning brush and ties and protecting the telegraph line from being injured thereby.

The plaintiff in error offered the testimony of competent witnesses in rebuttal of the foregoing testimony introduced in evidence by the defendant in error, but this was rejected by the Court, upon the objection of counsel for the defendant in error.

The jury, after being instructed as to the law of the case by the Court, returned a verdict, ascertaining and fixing the compensation to be paid to defendant in error at the sum of \$15,000.

Thereafter, the Court having overruled a motion for new trial, entered judgment thereon, in pursuance of the statutes above quoted. From this judgment the plaintiff prosecutes this writ of error.

SPECIFICATION OF ERRORS.

The trial Court committed the following errors:

I. Horace Middaugh, witness on behalf of plaintiff in error, having testified that he had been engaged in the railroad business about twenty-three years; that he was superintendent of bridges, buildings and track, and had charge of the right of way between Seattle and Sumas, being the right of way involved in this proceeding, between the years 1889 and 1899, inclusive, and an issue in said cause being the damage, if any, to the use and operation of said right of way by the defendant in error railway company for railway purposes by reason of the construction, maintenance and operation of the telegraph line by the plaintiff in error, as proposed in its petition herein, the following question was propounded to said witness, to-wit: "Q. Mr. Middaugh, from your knowledge of the right of way on this line from Seattle to Sumas, what would you say as to whether the construction and maintenance of a telegraph line would cause any injury or damage to

the use and operation of the right of way of the railroad company for railroad purposes; if so, what?" To which question defendant in error objected on the ground that the witness had not shown himself to be qualified. This objection was sustained by the Court, the reason given being that the witness' knowledge of this particular line was confined to too remote a period. (Assignment of Errors, I.)

II. The Court erred in permitting J. E. Craver, witness on behalf of defendant in error, to testify that it cost defendant in error additional expense in protecting certain existing telegraph poles on right of way of defendant in error in doing certain work in which the railway company was then engaged in answer to the following question propounded by the defendant in error, to-wit: "Q. Mr. Craver, I wish you would state to the jury, in doing that work that is being done around the Pilchuck where you are cutting out the grades and making a new fill, whether or not in doing that work, irrespective of the fact of obligations similar to those contained in this petition, if there is any added expense in making your fills around those poles or making your cuts under the poles." To which plaintiff in error objected as irrelevant, immaterial and incompetent, which objection was overruled and the exception of plaintiff in error thereto duly allowed. (Assignment of Errors, III.)

III. The defendant in error, having introduced

in evidence testimony tending to show special damage on account of the construction, maintenance and operation of the proposed telegraph line of the plaintiff in error in clearing and burning the brush on its right of way, in that additional expense would be involved in cutting the brush around the telegraph poles and in piling said brush and burning the same so as to avoid injury or damage to the proposed telegraph poles and wires of the plaintiff in error, the said plaintiff in error sought to prove in rebuttal, by one E. Colburn, civil engineer, a competent and experienced witness acquainted with said right of way, what was the character of the land embraced therein with respect to its susceptibility for growing weeds, grass and brush, and what, if any, would be the additional labor or time required in the periodical clearing of the right of way of brush by reason of the presence of the proposed telegraph poles, and sought to show by said witness that no material additional labor, time or expense would be incurred by the defendant in error in clearing and burning the brush on said right of way by reason of the presence of the proposed telegraph line; to all of which testimony the defendant in error objected on the ground that it was not rebuttal, and the Court erred in sustaining said objection, to which rulings of the Court the plaintiff in error excepted and its exception was allowed. (Assignment of Errors, IV.)

IV. The Court likewise erred in refusing to

permit the witness J. J. Lynch, a competent and experienced person, to testify in rebuttal that the cutting of brush on the right of way of defendant in error would require no additional time or expense because of the presence of the proposed telegraph poles thereon, and erred in sustaining the objection to said testimony on the ground that the same was not rebuttal, to which ruling of the Court plaintiff in error excepted and its exception was allowed. (Assignment of Errors, V.)

V. The Court erred in refusing to give instruction No. 5 requested by the plaintiff in error, which requested instruction reads as follows:

“As I have already indicated, the right of way of the railway company is owned and held by it solely for railroad purposes. It cannot sell, transfer, encumber or use it except as necessity and convenience may demand for the proper operation of its road. It can, therefore, have no market value because it cannot be placed upon the market, either at public or private sale. *In considering the question of compensation to be awarded to the defendant herein, you are therefore instructed that you are not to consider any evidence that may have been introduced or any knowledge possessed by individual members of the jury bearing upon the market value of the right of way, or any portion thereof, or of lands adjacent thereto; for in this proceeding you are called upon to*

consider only the uses to which this right of way is or will be devoted by the railway company on the one hand, and the telegraph company on the other, and to determine to what extent, if any, the use of said right of way by the railway company for railroad purposes will be diminished or damaged by the use which the telegraph company, the petitioner herein, seeks to acquire in this proceeding for the maintenance and operation of its telegraph line." (Assignment of Errors, VI.)

VI. Defendant in error having introduced testimony tending to show that in cutting the brush on the right of way it could not be burned as it fell because of the presence of the telegraph poles and wires, but that additional labor and expense would be required in order to pile the brush so as to avoid injury and damage to said telegraph poles and wires in burning said brush, the Court erred in refusing to give the first paragraph of the 6th instruction requested by the plaintiff in error, which reads as follows:

"You are further instructed that the statutes of the State of Washington do not impose any express duty upon the defendant railway company to cut or burn the brush growing on its right of way, nor to keep the same free from grass, weeds, brush or trees; neither does it impose any such express duty upon the telegraph company. If, however, the defendant

railway company does clear its right of way of timber, slashing, choppings, and brush, then it is made its duty under the laws of this state, as rapidly as the clearing or cutting progresses and the weather conditions permit or at such time as the forester or any of his assistants, or any fire warden may direct, to obtain a permit and to pile and burn the same on such right of way. (Assignment of Errors, VII.)

VII. The Court erred in refusing to give instruction No. 7 requested by the plaintiff in error, which requested instruction reads as follows:

“You are further instructed that if you believe from the evidence that the clearing of brush and other undergrowth immediately surrounding the poles of the telegraph company would require additional time and expense, then the defendant railway company will owe no duty to the telegraph company to cut or remove such brush and undergrowth, and it need not incur such additional expense unless you believe from the evidence that the cutting of such brush or undergrowth immediately around said telegraph poles would be necessary for the safe and proper operation of defendant’s railway trains and business or to prevent the spread of fires from the said railway across its right of way to adjoining lands.” (Assignment of Errors, VIII.)

VIII. The Court erred in refusing to give the 9th instruction requested by plaintiff in error, which requested instruction reads as follows:

“It will be your duty to ascertain from the evidence in this case what will be just compensation to the defendant company for the actual damages, if any, in the use of its right of way for railroad purposes, which may be occasioned by the appropriation by the petitioner of its proposed easement for its telegraph line; in determining this question you are instructed that nothing should be allowed for speculative damages or for such remote or inappreciable damages as the imagination may conjure up.

You are likewise instructed that you must not consider any advantages or benefits which may accrue to the telegraph company from its use of the railroad's right of way, in the assessment of damages. The railroad company can only claim compensation for such damages as will actually result to it in the use of its right of way for railroad purposes, by reason of the construction and maintenance of the telegraph line.” (Assignment of Errors, IX.)

IX. The Court erred in refusing to give the 10th instruction requested by plaintiff in error, which instruction reads as follows:

“You are further instructed that in determining the question of defendant's damages herein,

it will be your duty to take into consideration the nature and extent of the easement which the petitioner, by the terms of its petition filed herein, seeks to acquire, and likewise the stipulations by which it has proposed to bind itself herein. These descriptions and stipulations will by the decree which will be entered herein by the Court, bind the petitioner at all times hereafter and will determine and limit the rights which it acquires by this proceeding. Among other things, the petitioner binds itself that if at any time the defendant railway company, or its successors in interest, shall require for railroad purposes the immediate use of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, it will, at its own expense, remove its line to some other place to be designated by the railway company, adjacent thereto on said right of way, so as not to interfere with the use of said right of way for railroad purposes. It likewise binds itself that its telegraph line will not be erected on any bank or slope of said right of way without the consent of the railway company; and also, that if at any time, said railway company shall require its entire right of way for railroad purposes at any point, the petitioner will, at such point or points, remove its line entirely off the right of way." (Assignment of Errors, X.)

X. The Court erred in modifying the 11th instruction requested by the plaintiff in error by adding thereto and giving the following as a part of its instruction to the jury:

“But by this instruction the Court does not intend to intimate to you in any manner any view which it may entertain as to the amount which you should award the defendant herein.” (Assignment of Errors, XI.)

XI. The Court erred in giving the 4th instruction requested by the defendant in error, which instruction is as follows:

“You are further instructed that there is nothing in the final decree to be entered herein that imposes any responsibilities upon the petitioner, the Postal Telegraph-Cable Company, with reference to the maintenance of any part of the right of way of the defendant, but that as far as the public is concerned, the same liability is imposed upon the defendant, to care for, clear and protect the same as if the petitioner did not occupy any part thereof.” (Assignment of Errors, XII.)

BRIEF AND ARGUMENT.

Certain general principles, well-settled by judicial decision, are applicable to this proceeding, and as they will necessarily be involved in a consideration of the several errors assigned, it is appropriate

that they should be set forth at the threshold of the argument.

It will be noted that, contrary to the general rule in other states, the framers of the Constitution of the State of Washington declared, as a part of the public policy of that State, that telegraph companies were common carriers, and subject to legislative regulation and control as such. It was therefore deemed important that these common carriers should have the right to secure the most direct and advantageous routes for the establishment and maintenance of their telegraph lines, routes which would cause the least burden and inconvenience both to the corporations and the public. To that end, it was declared in the Constitution that railroad corporations, as one of the conditions of being permitted to acquire and own rights of way throughout the State for railroad purposes, "shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along" such rights of way (§19 Art. XII of the Constitution, quoted *supra*.)

The legislature of the State, in giving effect to the above constitutional provision, made the duty mandatory on railroad companies (R. & B's. Code, §9302, *supra*); and imposed a penalty as damages for failure to comply with these requirements of the Constitution and the law (R. & B's. Code, §9318, *supra*.)

Every railroad right of way in the State of

Washington is held, therefore, subject to the right of a telegraph company to impose upon it the additional servitude arising from the construction and maintenance of a telegraph line thereon, subject, however, to the limitation that such telegraph line shall be so constructed and maintained as not to "incommode the public use of the railroad." The statute, however, provides that "the *right* to construct and maintain such lines shall be secured only by the exercise of the right of eminent domain, as provided by law" (R. & B's. Code, §9314).

It is, therefore, evident that the exercise of this right, so far as relates to the "right of way" of a railway company, is not to condemn and appropriate the land, but merely to impose an additional servitude upon the right of way. As this right of way is already owned and held for a public use, which is not permitted to be incommoded, the only compensation which is to be awarded and paid to the railroad company in contemplation of the law of this State is the diminished value, if any, of the use of such right of way for railroad purposes that may be caused by such additional servitude. Neither the cost nor value of such right of way, nor the cost of its maintenance for railroad purposes, nor the expense to the railway company of discharging the duties it owes to the public or of obedience to the police power and regulations of the State, can be considered. While there is some conflict in the authorities as to the measure of damages in such cases, the

principles laid down in the following decisions must necessarily govern in this proceeding.

C. B. & Q. R. Co. v. Chicago, 166 U. S. 226.

Postal Telegraph-Cable Co. v. Ore. Short Line, 104 Fed. 626.

Postal Telegraph-Cable Co. v. Ore. Short Line (On appeal), 111 Fed. §48.

Postal Telegraph-Cable Co. v. Ore. Short Line, 23 Utah, 474; 65 Pac. 735.

Cleveland etc. R. Co. v. Ohio Postal Telegraph Co., 68 Ohio St. 306; 62 L. R. A. 941.

St. Louis etc. R. Co. v. Postal Telegraph-Cable Co., 173 Ill. 508; 51 N. E. 382.

Mobile & Ohio R. Co. v. Postal Telegraph-Cable Co., 26 So. 371 (Miss.).

Atlantic Coast Line R. Co. v. Postal Telegraph-Cable Co., 48 S. E. 15 (Ga.).

Western etc. R. Co. v. Western Union Telegraph Co., 75 S. E. 471.

While some of the foregoing cases recognize that compensation may be awarded for the space actually occupied by the poles, applying the rule for the ascertainment of damages only as to damages to the remainder of the right of way, such a distinction, though unimportant because of its insignificance, would not constitute an appropriate qualification of the above rule under the constitutional and statutory provisions above quoted.

The leading case on the subject is the decision of the Supreme Court of the United States in *C. B. &*

Q. R. Co. v. Chicago (*supra*). While in that case the question arose in a proceeding to extend a street of the City of Chicago across the right of way of the railway company, the same principles were involved as arise in this case. The Court, speaking by Justice Harlan, there said:

“In its opinion in this case the Supreme Court of Illinois says that when a city council, under the authority of the act of April 10, 1872, extends a street across railroad tracks or right of way, ‘it does not condemn the land of the railroad company nor prevent the use of the tracks and right of way.’ 149 Illinois, 457. We take this to be a correct interpretation of the local statute, and as indicating not only the interest acquired by the public through proceedings instituted for the extension of a street across the tracks and right of way of the railroad company, but also the extent to which the company was deprived, by the proceedings for condemnation, of any right in respect of the land. * * * The land as such was not taken, the railroad company was not prevented from using it, and its use for all the purposes for which it was held by the railroad company was interfered with only so far as its *exclusive* enjoyment for purposes of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street. (p. 248)
* * * When these proceedings were instituted

the railroad company had an exclusive right to use the land in question for tracks upon which to move its cars, and the city did not propose to interfere in any degree with the enjoyment of that right, otherwise than by the opening of a street across the tracks for public use. To what extent was the value of the company's right to use the land for railroad tracks unduly diminished by opening across it a public street? Under all the circumstances, in view of the purpose for which the railroad company obtained the land, for which the land was in fact used, and for which it was likely to be always used—which purpose is the most valuable one for the railroad company—that was the only question to be determined by the jury. As the right to open a street across the railroad tracks was all that the city sought to obtain by the proceeding for condemnation, it was not bound to obtain and pay for the fee in the land over which the street was opened.” (p. 251.)

It was contended in that case that the opening of a street across the right of way would impose additional burdens of expense upon the railroad company in safeguarding the public against dangers incident to the operation of the road and the maintenance of its right of way, and that proof of such additional expense was admissible for the purpose of showing the compensation due the company. Upon this question the Court said:

“Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law.” (p. 252.)

And after reviewing the authorities on this subject, the Court proceeds:

“The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental to the exercise of the police powers of the State. What was obtained, and all that was obtained, by the condemnation proceedings for the public was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people. And the value to the railroad company of that which was taken from it is, as we have said, the difference between the value of the right to the

exclusive use of the land in question for the purposes for which it was being used, and for which it was always likely to be used, and that value after the city acquired the privilege of participating in such use by the opening of a street across it, leaving the railroad tracks untouched." (pp. 255, 256.)

In the well-considered case of *Atlantic Coast Line R. Co. v. Postal Telegraph-Cable Co.*, 48 S. E. (*supra*), the Supreme Court of Georgia said: (p. 19)

"A burden not imposed by the telegraph line is not an element of damage. Likewise the cost of clearing the right of way, draining the same, and keeping it free from obstructions, which was expense incurred by the railway company for the purpose of operating its railroad, is not to be considered in assessing the damages, because this expense is incurred, not as a result of the construction of the line of telegraph, but because it was necessary to the railway company in the safe conduct of its own business, to do this very work. The right of way is cleared, the natural growth is removed, not to provide a suitable situs for the construction of a telegraph line, but to facilitate and aid the railway company in the operation of its trains. This condition of things existed at the time the telegraph company sought to build its telegraph line, and only to the extent that the telegraph

line interferes with the use of the right of way can the railway company recover damages. In the operation of its railroad, the railway company finds it necessary to burn off the grass and decayed vegetation, and to keep down undergrowth, to protect its tracks from the ravages of fire. Independently of the location of the telegraph line on its right of way, the railway company must continue to perform work of this character for the protection of its own property. What has been done for its own benefit cannot be claimed as an element of damages by reason of the occupancy of its right of way by the telegraph company's line."

Many of the cases hold under similar statutes that the railway company is entitled to only nominal damages.

Postal Telegraph-Cable Co. v. Ore. Short Line, 114 Fed. 788.

Mobile etc. R. Co. v. Postal etc. Co. (Ala.) 24 So. 409.

Mobile etc. R. Co. v. Postal etc. Co. (Tenn.) 41 L. R. A. 403.

Postal etc. Co. v. Ore. Sort Line, 23 Utah, (*supra*).

C. B. & Q. R. Co. v. Chicago, 166 U. S. (*supra*).

Postal etc. Co. v. Oregon etc. R. Co., 104 Fed. 626 (*supra*).

Under constitutional and statutory provisions

such as obtain in the State of Washington, we think the true rule is that in such a proceeding the damages to be awarded are necessarily only slight; and this was doubtless the real view of the courts in the above cited cases.

In *Mobile etc. R. Co. v. Postal etc. Co.*, 24 So. (*supra*), the Supreme Court of Alabama says: (p. 412)

“In the case before us, a very nominal amount of the land constituting right of way is proposed to be taken,—only that part of it occupied by the posts, 175 feet apart, leaving the way for all other purposes unobstructed. It is really an easement in an easement, a servitude, true, for which the company is entitled to some compensation under the constitution. The railroad company, however, holds its right of way so far as is made to appear simply for railroad purposes, and is restricted in its use of the same for such purposes. Under this view of the estate that the railroad company has in its right of way, it is difficult to see how the damages sustained by the road can be anything more than nominal.”

Since under the Constitution of the State of Washington the right is expressly given to impose the additional servitude upon the right of way of a railroad company, the power of eminent domain is exercised only for the purpose of legally enforcing this right by ascertaining and paying the com-

pensation to be awarded therefor. Such compensation is to be measured solely by the diminished value, if any, of the use of the right of way for railroad purposes caused by such additional servitude. In determining this question the proper test is laid down by the Supreme Court of Georgia in the case of *Atlantic Coast Line R. Co. v. Postal etc. Co.*, 48 S. E. 19 (*supra*), as follows:

“Any inconvenience or annoyance resulting from the construction of the telegraph line which is of such a character as *to interfere in any way with the operation of the railroad* by reason of the construction of the telegraph line may properly be considered by the jury in assessing damages, but the evidence must disclose the facts from which such inconveniences or annoyances result. No presumption of fact can be drawn that any special annoyance or inconvenience will result solely because of the construction of the telegraph line.” (Italics ours.)

I.

The Court erred in refusing to permit the witness Middaugh to answer the following question:

“Mr. Middaugh, from your knowledge of the right of way on this line from Seattle to Sumas, what would you say as to whether the construction and maintenance of a telegraph line would cause any injury or damage to the use and operation of the right of way of the railroad com-

pany for railroad purposes; if so, what?" (Record, p. 46.)

The witness had been permitted to answer a like question as applied to the construction and maintenance of telegraph lines on rights of way of railroad companies generally. The above question, however, applied the true test for the ascertainment of the damages, if any, to this particular case. The objection made was solely upon the ground that the witness had not shown himself qualified. The Court, after sustaining the objection, gave his reason as follows: "I think his knowledge of this particular line is confined to too remote a period." If there had been any merit in this view of the Court, it would have affected only the weight of the testimony and not the competency of the witness. In point of fact, however, the witness had been for ten years superintendent of this particular right of way. No suggestion is offered in the record in this case that since his employment terminated there had been any change in the topography, or in the physical condition or character of the railroad or the right of way, and none will be presumed. If the ruling of the Court be correct, plaintiff in error would be dependent for witnesses, expert in the particular railway service, upon the mere chance of finding as such witnesses persons who had recently severed their connection with the railway company. Mr. Midgah being the only expert witness of this character available to the plaintiff in error, the rejection

of this testimony was seriously prejudicial; for it cannot be said that his testimony was merely cumulative to that of the other witnesses of plaintiff in error whose experience had been confined to the telegraph service.

II.

The Court erred in overruling the objection of plaintiff in error to the following question propounded to the witness Craver:

“Mr. Craver, I wish you would state to the jury, in doing that work that is being done around the Pilchuck where you are cutting out the grades and making a new fill, whether or not in doing that work, irrespective of the fact of obligations similar to those contained in this petition, if there is any added expense in making your fills around those poles or making your cuts under the poles.” (Record, p. 95; Assignment of Errors, III.)

This objection should have been sustained. The question related to work being done at the time of the trial by the Railway Company on its grades approaching the Pilchuck River. Any such element of damage was eliminated by the stipulations contained in the petition. These stipulations are binding upon the Telegraph Company. It is well-settled that compensation cannot be recovered for damages avoided by the stipulations of the petition.

Tacoma Eastern R. Co. v. Smithgall, 58 Wash. 445.

Postal Tel. etc. Co. vs. Oregon etc. R. Co. 104
Fed. 627 (*supra*).

Atlantic Coast Line R. Co. v. Postal etc. Co.
48 S. E. 19 (*supra*).

Lewis on Eminent Domain, §732.

Claims of this character are eliminated from this proceeding by the following stipulations in the petition:

“That if at any time the said railway company, its successors or lessees, shall require for railroad purposes the immediate use of any of the land occupied by said telegraph line, then and in that event, upon reasonable notice in writing, this petitioner will, at its own expense, remove its line to some other place, to be designated by said railway company, adjacent thereto, on such right of way, so as not to interfere with the use of said right of way for railroad purposes. That said telegraph line will not be erected on any embankment or slope or any cut of said right of way, without the consent of said railway company; and if at any time said railway company or its lessees shall require its entire right of way for railroad purposes at any point, the telegraph company will at such point or points remove its line entirely off said right of way.”

III—IV.

The Court erred in refusing to permit the plaintiff in error to introduce in evidence the testimony

of the witnesses Colburn and Lynch. (Record pp. 97-101; Assignments of Error, IV and V.)

The objections to this testimony were made and sustained on the ground that it was not rebuttal. In other words, it was the view of the Court that this testimony, though competent and material, was a part of the case in chief, and might be properly excluded after the conclusion of the testimony of defendant in error. The theory upon which this ruling was based is that the burden of proof is upon the petitioner in condemnation proceedings in the State of Washington; and the error resulted from an improper application of this rule.

In condemnation proceedings, by the great weight of authority, the burden of showing damages which the owner of property will suffer rests on him.

15 Ency. of Law and Procedure, p. 898.

In the State of Washington, however, the rule was early adopted that the burden was upon the petitioner to show the reasonable value of the land sought to be appropriated, and that the petitioner was therefore entitled to open and close both in the presentation of proof and the argument to the jury.

Bellingham Bay etc. R. Co. v. Strand, 4 Wash.
311.

In this proceeding, as we have heretofore pointed out, plaintiff in error is simply exercising a right given by the Constitution to impose an additional

servitude upon the right of way of the railway company, and the only condition of the exercise of this right is that compensation, to be ascertained in this proceeding, shall be made for the damage, if any, resulting from the diminished value of the use of the right of way for railroad purposes. Plaintiff in error in the first instance produced and examined witnesses who testified that the value of the use for railroad purposes would not be diminished by the additional servitude to be created by the construction and maintenance of the proposed telegraph line under the stipulations of the petition. The burden of proving this negative was thus assumed and *prima facie* established by the plaintiff in error.

Where a party has the burden of establishing a negative, full proof is not required, but such proof as renders the existence of the negative probable is sufficient to shift the burden of proof.

1 *Greenleaf on Evidence* (Lewis Ed.) §78.

Beardstown et al. v. Virginia et al., 76 Ill. 37, 44.

People v. Pease, 27 N. Y. 45.

Commonwealth v. Bradford, 9 Metc. 268.

Vigus v. O'Bannon (Ill.) 8 N. E. 778.

The defendant in error did not attempt to meet the testimony offered by the plaintiff in error by any testimony of the same or like character. It qualified no experts and offered no direct testimony that the value of the use of the right of way for railroad purposes would be diminished by reason of the con-

struction and maintenance of the proposed telegraph line under the stipulations of the petition. It did, however, introduce testimony by which it sought to show certain elements of special damages. The chief of these, if not the sole one not excluded by the stipulations of the petition, was the testimony offered by its several witnesses tending to show that an additional annual expense would be imposed upon the Railway Company in cutting, piling and burning the undergrowth upon its right of way. It was this testimony which the plaintiff in error sought to rebut by the witnesses Colburn and Lynch. It seems to us clear that such alleged damages, when claimed, are special, and that in order to permit a fair trial the right to rebut must exist. That such a claim would be made by the defendant in error could not have been reasonably anticipated by the plaintiff in error. It has, indeed, been held by the courts that damages from the added expense of clearing and burning undergrowth on the right of way are too remote to be allowed.

Postal Tele. etc. Co. v. Ore. etc. Co. 23 Utah
(*supra*).

S. W. Tel. etc. Co. v. Gulf etc. R. Co., 52 S.
W. 107.

Atlantic etc. R. Co. v. Postal etc. Co., 48 S. E.
19 (*supra*).

While it is undoubtedly appropriate to apply the rule, in a proper case, that the answering testimony of the defendant tending to establish general

damages may not be rebutted by testimony of the same general character as that given in chief and in defense, this rule is clearly not applicable when the defendant for the first time asserts by the testimony offered in defense a claim for special damages. Suppose, for example, the defendant had introduced testimony that the proposed telegraph line of the petitioner would interfere with signal service wires installed or to be installed upon its right of way for the safe operation of its railroad. Such a claim could not be anticipated by the petitioner, especially where no defensive pleading is required to be filed. Yet it cannot be doubted that the petitioner would be entitled to meet such proof by the testimony of electricians, with such experience as to render them competent as expert witnesses, that there would be no such interference and that such claim was merely fanciful.

It will be observed that in adopting the rule as to the burden of proof, the Supreme Court of the State of Washington in *Bellingham Bay etc. R. Co. v. Strand*, 4 Wash. (*supra*), followed the decision of the Supreme Court of Illinois in *McReynolds v. Burlington etc. R. Co.*, 106 Ill. 152.

The Illinois courts have, however, since held that where the defendant claims special damages such as damages to the remainder, and introduces evidence in support of such claims, the petitioner may introduce rebutting evidence.

Chicago etc. Ry. Co. v. Phelps, 17 N. E. 771.

Hartshorn v. Ill. etc. Ry. Co., 75 N. E. 122,
125.

See also the earlier case of

Village of Hyde Park v. Dunham, 85 Ill. 569,
573.

This question has never been passed upon by the Supreme Court of the State of Washington, but it must be assumed that having adopted the original rule from the decision of the Illinois Court, the qualification or rather the application of that rule by the latter Court would likewise be followed. The testimony which was sought to be rebutted was the principal, if not the sole, testimony upon which the excessive verdict of the jury could have been based, under the instructions given by the Court. Plaintiff in error had a number of witnesses by whom it was prepared to rebut this testimony; and of this fact the Court was advised when the testimony was rejected (Record, p. 99). The rejection of the proffered testimony was seriously prejudicial to the plaintiff in error.

V.

The Court erred in refusing to give the fifth instruction requested by the plaintiff in error (Assignment of Errors, VI).

It is conceded that every portion of this instruction was sufficiently covered by others given by the Court, except the following:

“In considering the question of compensation to be awarded to the defendant herein,

you are therefore instructed that you are not to consider any evidence that may have been introduced or any knowledge possessed by individual members of the jury bearing upon the market value of the right of way, or any portion thereof, or of lands adjacent thereto."

The portion of the instruction above quoted was clearly correct. In view of the circumstances connected with the trial and of the verdict of the jury, it should have been given, and its refusal was prejudicial error.

VI.

The Court erred in refusing to give the following instruction requested by plaintiff in error (Assignment of Errors VII.):

"You are further instructed that the statutes of the State of Washington do not impose any express duty upon the defendant railway company to cut or burn the brush growing on its right of way, nor to keep the same free from grass, weeds, brush or trees; neither does it impose any such express duty upon the telegraph company. If, however, the defendant railway company does clear its right of way of timber, slashings, choppings, and brush, then it is made its duty under the laws of this state, as rapidly as the clearing or cutting progresses and the weather conditions permit or at such times as the forester or any of his assistants, or any

fire warden, may direct, to obtain a permit and to pile and burn the same on such right of way."

There is no statute law in the State of Washington imposing any express duty upon a railway company to keep its right of way clear even from combustible material. The only statute relating to the subject is as follows:

"Every one clearing right of way for railroad, wagon road or other road, shall pile and burn on such right of way all refuse timber, slashings, choppings and brush cut thereon as rapidly as the clearing or cutting progresses and the weather conditions permit, or at such other times as the forester or any of his assistants, or any warden, may direct, and before doing so shall obtain a permit." (Sessions Laws, 1911, p. 634.)

Witnesses for defendant in error testified that an additional annual expense was caused to the Railway Company in being compelled to cut and remove the brush and pile it away from the poles and wires and to guard the fires until the brush was burned, in order to avoid injuring the telegraph poles and wires. But as the Railway Company cannot lawfully clear and burn the brush except in accordance with the statute, any additional expense incident thereto must be borne exclusively by the Railway

Company under the authorities heretofore cited, and cannot be imposed upon the Telegraph Company. If this element of damage were eliminated from the case, there would, under the stipulations of the petition, be no substantial basis upon which the excessive verdict of the jury could rest.

The Court, on the other hand, instructed the jury that "The law requires a railway company to use reasonable diligence in keeping its right of way clear from inflammable material, and that where it fails to do so, and damage results therefrom, the railway company is liable." Thus the jury were left to draw an inference directly converse to the law as stated in the instructions Nos. 6 and 7 requested; and this, notwithstanding it is the settled law that in the absence of a statute it is not negligence *per se* to permit brush, etc., to grow or accumulate on a right of way, the question of negligence being one of fact for the jury.

Union Pac. Ry. Co. v. Gilland (Wyo.), 34 Pac. 953.

Perry v. S. P. R. R. Co., 50 Calif. 579.

R. R. Co. v. Shanefelt, 47 Ill. 497.

R. R. Co. v. Mills, 42 Ill. 411.

Spencer v. R. R. Co. (Mont.), 27 Pac. 682, 683.

As we have heretofore seen, plaintiff in error was entitled to have the jury correctly instructed concerning the duties imposed upon the railway

company by the regulative provisions of the statutes of the State.

C. B. & Q. R. Co. v. Chicago, (*supra*), pp 255, 256.

(And see, *ante* p. 31-2.)

VII.

The Court erred in refusing to give the following instruction (No. 7) requested by plaintiff in error (Assignment of Errors, VIII) :

“You are further instructed that if you believe from the evidence that the clearing of brush and other undergrowth immediately surrounding the poles of the telegraph company would require additional time and expense, then the defendant railway company will owe no duty to the telegraph company to cut or remove such brush and undergrowth, and it need not incur such additional expense unless you believe from the evidence that the cutting of such brush or undergrowth immediately around said telegraph poles would be necessary for the safe and proper operation of defendant’s railway trains and business or to prevent the spread of fires from the said railway across its right of way to adjoining land.”

This instruction was manifestly a correct statement of the law, and its refusal was gravely prejudicial. The witnesses for the defense based their

estimates of added annual expense largely upon the claim that it would require more time and labor to cut the brush and undergrowth immediately around the poles and to remove and pile it so as to avoid injury or damage to the poles and wires when they were burned. As the plaintiff in error was not permitted to rebut this testimony and to show how chimerical and fallacious it was, it was the more important that the jury should have been properly instructed upon the subject. If the cutting and burning of the brush about the poles was necessary only for the convenience and safety of the telegraph line, then the duty to cut and burn it would devolve alone upon the telegraph company. It could not devolve upon the railway company to incur such additional expense, unless it appeared to the jury from the evidence in the case that such expense would necessarily be incurred by the defendant in error to secure the safe and proper operation of the railway company's trains and business and to prevent the spread of fires to adjacent property. The principle involved is so self-evident that, so far as we are able to discover, the question has never been presented to the courts for consideration, except in the case of *Postal Tele. etc. Co. v. L. W. R. Co.*, 22 So. 219, 222. In that case it is said:

“We think the poles are sufficiently removed from defendant's track to justify our designating danger from the same as a remote danger even as to the sidings. The railroad right of

way has been already fenced in (in their own interest) in almost its entire length. Defendants are not called on to make any change in the same, in the interest of the plaintiffs; *nor will they be specially called on, in the interest of the latter, to keep their right of way clear of grass, to guard plaintiff's poles from danger from fire.* Railroad companies are under a general obligation to keep their tracks free from combustible materials, *but the plaintiffs in voluntarily seeking to place their line along defendants' right of way, assume certain risks, and also the obligation of taking the necessary steps and precautions for the protection of their own property from fire, and for the operation of their line.* Defendants' fear of danger of liability from the presence of the telegraph poles on their right of way is greatly exaggerated, if it exists at all." (Italics ours.)

VIII.

The Court erred in refusing to give the ninth instruction requested by the plaintiff in error (Assignment of Errors, IX). The following language in this instruction was not covered by any other instruction given by the Court:

"You are likewise instructed that you must not consider any advantages or benefits which may accrue to the telegraph company from its use of the railroad's right of way, in the assess-

ment of damages. The railroad company can only claim compensation for such damages as will actually result to it in the use of its right of way for railroad purposes, by reason of the construction and maintenance of the telegraph line."

This instruction was requested for the purpose of preventing the effect of an appeal to the jury for the allowance of excessive damages on the ground that in going upon the right of way of the railway company, the petitioner was saved the necessity of acquiring by condemnation and of then clearing and improving another sufficient right of way between the termini of the proposed telegraph line. It was requested in order to prevent the jury from being misled as to the very object of the constitutional and statutory provisions of the State of Washington. That such is the law even in the absence of such constitutional and statutory provisions, see:

R. R. Co. v. Tele. Co., 48 S. E. 15 (*supra*), where it is said:

"That the right of way may possess peculiar advantages and benefits to the telegraph company in the construction and maintenance of its line is not a proper element in the estimate of damages."

California etc. R. Co. v. S. W. Tele. Co., 52 S. W. 86, where it is said:

“What extraordinary advantages might accrue to the telegraph company by being accorded the use of land already cleared of brush and other obstructions should not enter into consideration in fixing the damages to appellant, because it is clear that its damages have not been enhanced by the great advantages obtained by appellee in using its right of way.”

Texas etc. R. Co. v. Postal etc. Co., 52 S. W. 108, where it is said:

“Under no conceivable state of facts could the value of the use of the right of way to appellee be made the measure by which to determine the damages sustained by appellant.”

IX.

The Court erred in refusing the tenth instruction requested by plaintiff in error (Assignment of Errors, X).

It is true that the Court called the jury's attention to the petition, giving the substance thereof in its first instruction, and advised the jury that they were to consider the stipulations contained in the petition. But in view of the fact that the estimates of annual expense given by the several witnesses for the defendant in error embraced numerous elements not in any wise segregated or distinguished by the witnesses in giving their estimates, and which elements, under the stipulations, could not be consid-

ered in arriving at the true measure of damages and in ascertaining the proper sum to be returned as their verdict, plaintiff in error was entitled to have its instruction given as requested. Because of the state of the evidence, the Court should have specifically instructed the jury respecting the stipulations which must guide them in weighing the evidence and arriving at their verdict.

X.

The Court erred in modifying instruction No. 11 requested by plaintiff in error by adding the words at the conclusion thereof:

“But by this instruction the Court does not intend to intimate to you in any manner any view which it may entertain as to the amount which you should award the defendant herein.”
(Assignment of Errors, XI.)

The instruction as requested was a correct statement of the law. The added statement of the Court was wholly unnecessary and was calculated to weaken if not destroy the force of the instruction requested.

XI.

The Court erred in giving the fourth instruction requested by defendant in error (Assignment of Errors, XII).

The error of this instruction is rendered apparent by what is said under subdivision VII of this brief.

For the several reasons here presented, the judgment should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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